# QUEENSLAND COURTS AND TRIBUNALS

# TRANSCRIPT OF PROCEEDINGS

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**DISTRICT COURT OF QUEENSLAND**

**CIVIL JURISDICTION**

**JUDGE PORTER KC**

**No 1907 of 2022**

| | |
|---|---|
| **DREW PAVLOU** | **Appellant** |
| **and** | |
| **JIE** | **Respondent** |

**BRISBANE**

**10.12 AM, FRIDAY, 25 NOVEMBER 2022**

**DAY 1**

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HIS HONOUR: Just give me a sec, okay, Mr Stumer. Yes. Thanks, Mr Stumer, are you ready?

MR A.C. STUMER: May it please the court my name is Stumer, S-t-u-m-e-r, initials A.C. I appear on behalf of the applicant/appellant Mr Drew Pavlou. I am instructed by Mark Tarrant Lawyers.

HIS HONOUR: Thank you. I think in the circumstances we won't call the respondent.

MR STUMER: Yes.

HIS HONOUR: All right. Mr Stumer.

MR STUMER: Your Honour already has two folders that I handed up to you on the last case.

HIS HONOUR: I am pretty sure I do so - - -

MR STUMER: There should be one labelled Materials For Appeals/Extension of Time.

HIS HONOUR: I have that one.

MR STUMER: It contains in part A the material that - - -

HIS HONOUR: Yes, the part B material - - -

MR STUMER: - - - was before the magistrate. Part B the material on the appeal.

HIS HONOUR: Yes, yes.

MR STUMER: There should be a folder called Authorities for the Appellant.

HIS HONOUR: Lynette, go and find me a folder called Authorities for the Appellant, please. It will be up in chambers somewhere, Mr Stumer.

MR STUMER: Yes. Thank you, your Honour. I am planning to take your Honour to both of those folders.

HIS HONOUR: Yes. No, that's okay. It will be there somewhere.

MR STUMER: While that is happening, your Honour - - -

HIS HONOUR: Although in fact as it turned out I printed a fair bit out as I was going through your submissions.

MR STUMER: I see.

HIS HONOUR: I'm sorry you have gone to the trouble of providing that to me and I have forgotten that I had it, sorry.

MR STUMER: Well, it will hopefully be convenient this morning.

HIS HONOUR: Yes, I am sure.

MR STUMER: Because I am going to take your Honour to the relevant parts of the relevant cases.

HIS HONOUR: Thanks.

MR STUMER: Your Honour, there is also an affidavit, a further affidavit of my solicitor that was filed earlier this week.

HIS HONOUR: Yes.

MR STUMER: Can I hand up a working copy of that - - -

HIS HONOUR: Sure.

MR STUMER: - - - affidavit, your Honour. I have included a tab 10 with that. Your Honour might find it convenient to include that at the back of your folder.

HIS HONOUR: Yes.

MR STUMER: While I am handing that up, the affidavit refers to a set of videos that were filed in the Magistrates Court at first instance.

HIS HONOUR: Yes.

MR STUMER: Those weren't on the record of proceedings as far as I can see so if I can hand your Honour a USB stick that has those videos on there.

HIS HONOUR: Yes, because you are correct, Mr Stumer and in fact when I was shown what you must have looked at when we were last together I said to my Associate "This is a copy of the file. I want the file."

MR STUMER: Yes.

HIS HONOUR: And I haven't been able to achieve - - -

MR STUMER: I see.

HIS HONOUR: - - - that objective.

MR STUMER: I see.

HIS HONOUR: So by all means hand up your stick and - - -

MR STUMER: I will.

HIS HONOUR: - - - I will make it an exhibit in the appeal - in the application for leave.

MR STUMER: Yes. Thank you, your Honour. There are also two further cases that I will take your Honour to - - -

HIS HONOUR: Okay.

MR STUMER: - - - on the question of leave for further material.

HIS HONOUR: Sure.

MR STUMER: I will hand all of that up. I hand all of that up now.

HIS HONOUR: Thanks. Just give me one second.

MR STUMER: One further thing, your Honour, while I am handing things up to your Honour, I will be going back and forth from my written submissions. It might be convenient if your Honour has a loose copy of the written submissions.

HIS HONOUR: Already done.

MR STUMER: Excellent.

HIS HONOUR: Just give us a second, Mr Stumer, until I put this in the right place. This affidavit you've handed me it's already been filed in the - - -

MR STUMER: It has been filed.

HIS HONOUR: It hasn't been?

MR STUMER: It was filed on Tuesday.

HIS HONOUR: Yes, it has been filed, yes.

MR STUMER: It will be a few moments before I need to take your Honour to the folder of authorities so - - -

HIS HONOUR: That's all right.

MR STUMER: - - - if it is convenient I will - - -

HIS HONOUR: Just give us one second. I think I'm set. Thank you.

MR STUMER: Thank you, your Honour. Your Honour, my submissions today will be in five parts. First, I will deal with the question of leave to rely on further

affidavit material and in the course of doing that I will also address the admissibility of that material as your Honour has requested. I will spend a little bit of time taking your Honour through the documents explaining their significance. Hopefully that will mean I won't need to take your Honour back to it again - - -

HIS HONOUR: Sure.

MR STUMER: - - - when we come to the substance of it.

HIS HONOUR: And Mr Stumer I have actually read quite a lot it.

MR STUMER: Yes.

HIS HONOUR: Not in excruciating detail but I've got far enough to know I wanted to understand admissibility, for example.

MR STUMER: Yes, and I will try to assist your Honour with understanding the admissibility.

HIS HONOUR: Yes.

MR STUMER: In the course of that there are some documents that I want to press and - - -

HIS HONOUR: You will tell me.

MR STUMER: - - - I would take your Honour through that. The second thing I am going to do is take your Honour to the evidence concerning the incident at the University of Queensland on the 24th of July 2019.

HIS HONOUR: Yep.

MR STUMER: And the statement of the respondent consul-general that followed that incident.

HIS HONOUR: Yes.

MR STUMER: Third, I will take your Honour through the authorities dealing with consular immunity for the purpose of explaining why the statement of the respondent does not attract consular immunity. That is the key issue in the appeal, of course.

HIS HONOUR: Yes.

MR STUMER: Fourth, I will address the question of making a peace and good behaviour order and particularly the utility of making that order. And fifth, I will address your Honour on the question of an extension of time within which to appeal. That last issue is a procedural issue. In strict logic it should - - -

HIS HONOUR: Mr Stumer, the extension of time is going to be the least of your

worries.

MR STUMER: Yes, that is why I put it last, your Honour.

HIS HONOUR: In fact, it seems to me that it is going to be - stand or fall on the submissions on the substantive point.

MR STUMER: Yes, your Honour. So for example - - -

HIS HONOUR: Thank for not forgetting it but I don't think you will need to leave much time for it.

MR STUMER: Yes.

HIS HONOUR: I accept his explanation.

MR STUMER: Thank you.

HIS HONOUR: It is not like - in fact, it is - probably the most significance of it is that I've got actually two questions which come up from - convenient from this point.

MR STUMER: Yes.

HIS HONOUR: Number one, can you tell me: do you know how to say the consul-general's family name properly?

MR STUMER: Your Honour, I would be - - -

HIS HONOUR: I might call him the consul-general - - -

MR STUMER: - - - too ambitious - - -

HIS HONOUR: - - - because I don't want to say it wrongly or pick the wrong one of the two names.

MR STUMER: Yes, I think I would be too ambitious if I tried to pronounce it.

HIS HONOUR: Right. The second thing is do you know if the consul-general remains consul-general in Brisbane?

MR STUMER: In Brisbane? I don't know but my understanding is no and I will take your Honour to some material about that which is in the most recent affidavit of my solicitor. That has some implications obviously for, in particular, probably the utility of the peace and good behaviour order.

HIS HONOUR: And all of that feeds into whether I grant leave.

MR STUMER: Yes.

HIS HONOUR: In fact, interesting though - and I have been doing a fair bit of work on this myself - interesting though points 1, 2, 3 and 4 are - 1, 2 and 3 are, if the then consul-general is no longer consul-general is there any point in granting leave? Because ultimately when one comes to the heart of the case after we deal with the immunity - well, it is called immunity, it is a jurisdictional point of course which is - gives it quite a different legal characteristic.

MR STUMER: Yes.

HIS HONOUR: Interesting though the jurisdictional point is, and it is interesting, if ultimately we are going to come to one way or another and if one can persuade me on the balance of probabilities on admissible evidence I think, but I will hear your submissions about that, that there was a threat to procure a person to assault the applicant - - -

MR STUMER: Yes.

HIS HONOUR: - - - and that the applicant remains in fear of the consul-general - - -

MR STUMER: Yes.

HIS HONOUR: - - - not the sending state of that man in particular.

MR STUMER: Yes.

HIS HONOUR: And the capacity of the consul-general to cause this difficulty arises - arose from and is related to his official function.

MR STUMER: Yes.

HIS HONOUR: As consult for the sending State and he is not the consul-general any more, why would we bother, Mr Stumer?

MR STUMER: Yes. There's probably three reasons why there might still be utility, your Honour. The first is even though he is not the consul-general in Brisbane any more he can - could perform acts outside of Australia that involved publication within Australia. The second is he could return to Australia for any reason. And the third is, and I will address your Honour further on this, the peace and good behaviour order has an element of communication to the people who might be minded to act upon the threat. So that even if the consul-general is not in Australia there is utility in making the order for that reason. I will come to that point in a moment.

HIS HONOUR: That sounds like the best point of the three.

MR STUMER: Yes.

HIS HONOUR: All right. Well, thank you for that.

MR STUMER: It is not a point that I have overlooked, your Honour.

HIS HONOUR: I never thought it was, Mr Stumer.

MR STUMER: Indeed, the affidavit of my solicitor today is to ensure that we don't conceal from your Honour - - -

HIS HONOUR: Yes.

MR STUMER: - - - the fact that the consul-general is no longer in Australia in our understanding.

HIS HONOUR: Yes. It is actually not something that I want you to address me on or that I want you to worry about but these kinds of applications which are fairly unique in circumstances where the Commonwealth Attorney-General doesn't decide to get involved are in the nature of ex parte proceedings.

MR STUMER: Yes.

HIS HONOUR: For reasons that I don't want to delve into, you wonder in that case about the obligation on the applicant but it is not something we are going to find any authority on.

MR STUMER: No.

HIS HONOUR: My prima facie position anyway is, Mr Stumer, that it doesn't attract the ordinary obligations. Obviously the court can't be misled - - -

MR STUMER: Yes.

HIS HONOUR: Obviously counsel and solicitors have a duty to assist the court in determining jurisdiction because, as we both know, that's a matter the court has to determine for itself in a sense somewhat outside the ordinary adversarial framework.

MR STUMER: Yes.

HIS HONOUR: That's enough to address what duties, if any, the applicant has in a situation like this. But it is an odd one, isn't it? Because on the one hand the cases say well, if the immunity which excludes jurisdiction arises well the point is they don't come at all. But they have been served.

MR STUMER: Yes.

HIS HONOUR: It seems to me the question of the strict rules on appealing on ex parte application wouldn't apply. Anyway, I don't want to distract you from this.

MR STUMER: I certainly proceeded on the basis that I don't want to mislead the court.

HIS HONOUR: Of course not.

MR STUMER: And I don't want to withhold from the court any fact that might be material.

HIS HONOUR: Material to the jurisdictional question.

MR STUMER: To the jurisdictional question or the exercise of the discretion about making an order under the Peace and Good Behaviour Act.

HIS HONOUR: I would expect nothing less, Mr Stumer. All right.

MR STUMER: Just one comment that arises out of - one submission, sorry, that arises out of something your Honour said.

HIS HONOUR: Yes.

MR STUMER: Your Honour could allow the appeal and then having allowed the appeal exercise the discretion under the Peace and Good Behaviour Act in either direction, either to make the order or not to make it.

HIS HONOUR: Yes.

MR STUMER: That is one possibility available to your Honour.

HIS HONOUR: I understand.

MR STUMER: Your Honour, I am going to begin by dealing with that question of leave to rely upon further affidavit material.

HIS HONOUR: Yes.

MR STUMER: There is now six affidavits for which my client requires leave under section 223 of the Justices Act. I will take your Honour to each of the affidavits, explain the reasons why leave ought to be granted and address the questions of admissibility.

HIS HONOUR: And the principles we are applying is it new - generally, the discretion can't be confined - but is it new? Is it credible? Is it material?

MR STUMER: Yes, your Honour. That is right. I will take your Honour very briefly to I think the leading case on section 223. In fact, I probably don't need to take you to the statutory provision unless your Honour wants to look at it.

HIS HONOUR: I know what it says. I know it doesn't say those three criteria.

MR STUMER: No.

HIS HONOUR: Sorry, actually, I say I know. It says special circumstances or - - -

MR STUMER: It says special grounds.

HIS HONOUR: Special grounds.

MR STUMER: Yes.

HIS HONOUR: But that has been interpreted, certainly by judges of this court to pick up the express statutory provisions in the UCPR applicable to fresh evidence on a rehearing in the Court of Appeal.

MR STUMER: It certainly is the same principles.

HIS HONOUR: Yes, sorry, it doesn't pick it up technically.

MR STUMER: Yes.

HIS HONOUR: But they are the criteria which ordinarily are applied to inform special grounds are made out.

MR STUMER: Yes, so your Honour might be thinking of the principles that are set out in Clark v Japan Machines Australia Pty Ltd and they are the same three principles - - -

HIS HONOUR: Yes.

MR STUMER: - - - that the Court of Appeal has said apply under section 223. So if your Honour has Pavlovich, it is one of the cases I handed up.

HIS HONOUR: Yes.

MR STUMER: Pavlovich v Commissioner of Police [2007]1 Qd R 344.

HIS HONOUR: Yes, so reasonable diligence couldn't be obtained. I mean, is it new?

MR STUMER: Yes.

HIS HONOUR: I know it doesn't have to be new, I know that actually is the test.

MR STUMER: Yes.

HIS HONOUR: And is it credible and is it material?

MR STUMER: Yes.

HIS HONOUR: But I know that is shorthand for those three more detailed statements.

MR STUMER: Yes and it is the same principles that are applied on appeal to the Court of Appeal as set out in Clark v Japan Machines. I just - I won't take your Honour through the case in detail but if I could take your Honour through paragraph 31. That sets out the first consideration.

HIS HONOUR: Yes.

MR STUMER: Whether the evidence relied on could, with reasonable diligence have been produced etcetera. Then if one comes down to paragraph 34 the Court of Appeal reasons that the evidence could have been produced - - -

HIS HONOUR: I don't mind you telling me that but I know it is not an inflexible rule.

MR STUMER: Yes. So that's the only point I wanted to make, your Honour.

HIS HONOUR: None of these are inflexible rules because I am actually applying a statutory provision which says, as you remind me, special grounds.

MR STUMER: Yes, yes. So I suppose they are guidelines for your Honour rather than inflexible rules.

HIS HONOUR: Than actual rules. Like a pirates code in Pirates of the Caribbean.

MR STUMER: More of a guideline, yes. Now, your Honour, there are some parts in the evidence I am about to take you to that could have been available at the time of the original hearing.

HIS HONOUR: It is a funny situation though, isn't it, Mr Stumer? I am conscious of the caveat on the principle and I know why you have taken me to it because this all happens in an unusual way compared to ordinary litigation under the Peace and Good Behaviour Act because you have to put on this material, like search warrant type material, to substantiate the claim to get a Justice of the Peace to issue the summons.

MR STUMER: Yes.

HIS HONOUR: And section 6 says pretty much you can throw anything you like in there.

MR STUMER: Yes.

HIS HONOUR: As long as it is consistent with the law about this rationally probative. But then in section 7 you have to have the summons heard and determined in court.

MR STUMER: Yes.

HIS HONOUR: So it comes before her Honour with the file containing lots of

material which, while arguably able properly to be considered under section 6 some might think wasn't admissible evidence under section 7 - admissible evidence on the determination of a legal question by a court.

MR STUMER: Yes.

HIS HONOUR: And so it comes before her Honour and then Mr Morris comes and makes a submission that it is covered by immunity and her Honour decides that without, as far as I can tell, anyone reading any material formally.

MR STUMER: Yes.

HIS HONOUR: Is that your reading of the transcript?

MR STUMER: That is my reading of the transcript, yes.

HIS HONOUR: So on one view of it it was dealt with summarily without the reading of any material. But I'm happy - I am willing to proceed on the basis that the material that was filed in support of the substantiation to have the issue of the summons was implicitly relied on before her Honour because they were, both her Honour and Mr Morris, were talking about things that were in that material.

MR STUMER: Yes. And it's - - -

HIS HONOUR: It is not an unusual experience in my sitting in appeals from the Magistrates Court. I don't say that critically of that court. You know, we think we are busy here - - -

MR STUMER: Yes.

HIS HONOUR: - - - you should see what one day in the Magistrates Court can be like.

MR STUMER: Yes, your Honour.

HIS HONOUR: But nonetheless, it is not uncommon for there to be some ambiguity about what material was relied on in an application. I am content to proceed on the basis of the material that was filed to substantiate the application.

MR STUMER: Yes.

HIS HONOUR: But in circumstances where - sorry to talk about this Mr Stumer but I have thought about some of these things - in circumstances where I am assessing jurisdiction and where there was nobody on the other side to waive objections.

MR STUMER: Yes.

HIS HONOUR: I am inclined to only act on admissible evidence.

MR STUMER: Yes.

HIS HONOUR: Okay?

MR STUMER: Yes and I won't urge your Honour to act on things that would be inadmissible under the ordinary rules of evidence. I will make some submissions about why things are admissible - - -

HIS HONOUR: No, I understand. I understand. Because the trick about this is going to be well, what issue does it go to.

MR STUMER: Yes.

HIS HONOUR: I can see how various versions of Supramarnow will come up, you know, where something is hearsay if you rely on for its truth, it is not hearsay if you rely on it for the fact it was said.

MR STUMER: Yes.

HIS HONOUR: There is various bits of material that you might wonder about that might just go to the reasonable basis for the fear of something.

MR STUMER: Yes.

HIS HONOUR: Or other things. Other things. You will be closer to it than me, Mr Stumer. That is why I gave you the heads up.

MR STUMER: Yes, the thing that might have peaked your Honour's interest was the newspaper articles which normally one would look at those and say; why are they there? I can say from the outset I am not relying upon them as evidence of the truth of the matters stated in them.

HIS HONOUR: No.

MR STUMER: And I had made that point in a footnote in my submissions.

HIS HONOUR: Right. Look, there is other things and you know what, Mr Stumer, I'm sure you have thought about it so we will just go through it and see what happens.

MR STUMER: Yes.

HIS HONOUR: I just wanted to lay out for you the way I had thought through this question about what was the record below.

MR STUMER: Yes.

HIS HONOUR: Do the rules of evidence - should the rules of evidence have applied on the substantive hearing under section 7?

MR STUMER: Yes.

HIS HONOUR: They should. For reasons I can go into but you are not cavilling with that, I take it?

MR STUMER: No, I am not. So I had observed the distinction between section 6 where the Justice of the Peace can inform themselves - - -

HIS HONOUR: Look at anything rationally probative.

MR STUMER: But then one - when one moved to section 7 that proviso was not there so the - - -

HIS HONOUR: Common law position - - -

MR STUMER: - - - assumption is - - -

HIS HONOUR: - - - or the common law presumption - - -

MR STUMER: Yes, your Honour, yes. The rules of evidence apply.

HIS HONOUR: Yes.

MR STUMER: So that it is necessary to rely only upon admissible things.

HIS HONOUR: We are at one on that point, Mr Stumer.

MR STUMER: Yes. Thank you.

HIS HONOUR: All right. Let's go.

MR STUMER: So, your Honour, if you could take up the folder of materials.

HIS HONOUR: I have that.

MR STUMER: Your Honour, when I inspected the copy of the record of proceedings - - -

HIS HONOUR: Yes.

MR STUMER: - - - I was able to locate all of the documents that are in part A of the following materials except for the video file which I have handed up to your Honour.

HIS HONOUR: Let me tell Lynette because she wasn't here. Lynette, you take possession of this. This has the video files that are referred to. We will make that exhibit 1 on the appeal.

**EXHIBIT #1 ADMITTED AND MARKED**

MR STUMER: Yes, the other document I could not find on the file was document 4 in the index. It is an affidavit of Clive Charles Hamilton affirmed on 21 November 2019.

HIS HONOUR: What made you think it should be there, Mr Stumer?

MR STUMER: Because it is referred to in the Chinese embassy memorandum so it seemed to be material that - - -

HIS HONOUR: That had been served on the embassy at least?

MR STUMER: Yes. Can I say that I am not going to rely on that affidavit?

HIS HONOUR: I wouldn't have thought so - - -

MR STUMER: So your Honour needn't be troubled by document 4 and whether it was or was not on the record because I don't press it.

HIS HONOUR: No, because in my respectful view it is entirely inadmissible.

MR STUMER: Yes. Yes, your Honour.

HIS HONOUR: You don't have to agree with that, I have formed my own view about it unless you wanted to make a submission to the contrary.

MR STUMER: Well, I formed the view that - - -

HIS HONOUR: You are not relying on that so that is - - -

MR STUMER: I am not relying on that. That is enough.

HIS HONOUR: It is enough, Mr Stumer.

MR STUMER: That then brings us to part B which is the material for which my client requires leave.

HIS HONOUR: Yes.

MR STUMER: The first document is under tab 3. It is an affidavit of Mr Pavlou sworn 1 May 2022.

HIS HONOUR: I have that.

MR STUMER: Now, the relevance of the affidavit, your Honour, is the continuing fear of Mr Pavlou.

HIS HONOUR: Yes, the difficulties though is that it is not enough that he have continuing fear, he has to have continuing fear of the consul-general.

MR STUMER: Yes.

HIS HONOUR: It doesn't say that. Paragraph 2 says:

> *I continue to hold fear of assault if I engage in protests in Australia concerning China.*

It doesn't say:

> *I continue to have a fear that a person who I suspect on the evidence I have seen hasn't done anything since the alleged threat to procure others to assault three years ago.*

Is the person who he fears will procure others to assault him. That is the difficulty I have with that.

MR STUMER: I understand what your Honour says about that. That's the relevance of it though, in a general sense. I understand the limitation on it, on that point. I will address your Honour further about that towards the end. But in terms of the general relevance and therefore admissibility of it, it relates to his fear. Your Honour might think it doesn't go far enough but in my respectful submission that doesn't make it inadmissible, it just might make it not sufficiently cogent for your Honour to act upon.

HIS HONOUR: Well, except for this problem. It has to be relevant and unless it is rationally able to influence my conclusion that he is or isn't still now three years later afraid of Mr - I will say Jie, just calling him consul-general is a bit clunky - with respect to him - hopefully I have it right, hopefully he has put his family name first as I understand is the practice. Mr Jie - fear of Mr Jie and it doesn't say he has any fear of that man and in circumstances where there is no suggestion that man has done anything to cause him fear for the last three years it seems to me it is not capable of rationally influencing my conclusion on that fact in issue.

MR STUMER: Can I come back to that at the end, your Honour?

HIS HONOUR: Yes, please do. I understand the basis you are saying it is relevant, Mr Stumer.

MR STUMER: Yes. I will try to address - - -

HIS HONOUR: That is right, you come to it - I am sure you have a structure for it, don't let me interrupt your structure. That is what it is relevant to, yes.

MR STUMER: That is the general relevance of that.

HIS HONOUR: I understand.

MR STUMER: Paragraphs 3 to 8 are in a similar sort of vein and then paragraph 12 explains the reasons for the delay in bringing the appeal.

HIS HONOUR: Yes, well - - -

MR STUMER: Which is relevant to the application for an extension of time.

HIS HONOUR: I think if I think the appeal has merit you will get your extension and if I don't, you won't. I accept what he says at 12. Anyway, 12 is certainly admissible for that purpose, no problem.

MR STUMER: Yes. Thank you. If we can move over to the document under tab 4, it is an affidavit of my solicitor, Mr Tarrant, sworn on 12 May 2002. This annexes reporting about violence at pro-democracy protests in Hong Kong and reporting about violence at the University of Queensland on 24 July and there are some descriptions of what's in the documents in Mr Tarrant's affidavit.

HIS HONOUR: You don't rely on them, you just rely on - - -

MR STUMER: Yes, I rely on the documents rather than the descriptions. Of course, as I have said, I don't rely upon the news reports as evidence of the truth of the matters stated in them.

HIS HONOUR: Yes.

MR STUMER: It is the fact of publication that is relevant and the fact of publication is relevant because it provides the context against which the statement of the consul-general on 25 July comes to be interpreted. So there are matters that have been reported publicly and then one - when one comes to interpret the statement, in my submission, one can interpret it against the background of the matters that have been reported publicly about the events on the day before.

HIS HONOUR: That's assuming I can conclude Mr Jie has made a threat purely objectively, that there is no element of mens rea in the concept of a threat. So that he can say something - because there's two ways this can be analysed, Mr Stumer.

MR STUMER: Yes.

HIS HONOUR: One or both. That he had a subjective intention to threaten.

MR STUMER: Yes.

HIS HONOUR: Or put in the broader way, you articulated in your submission a subjective intention to do an act which brought about the suppression of I think the expression was free speech in assembly.

MR STUMER: Yes.

HIS HONOUR: If you go there then I need to be satisfied on the balance of probabilities taking into account the Briginshaw observations in these cases that as consul-general he had the subjective state of mind to bring that about which I can only do by inferring his state of mind from facts.

MR STUMER: Yes.

HIS HONOUR: That's one way it can be done.

MR STUMER: Yes.

HIS HONOUR: At least on the basis of the cases you have cited in your outline. The other way is to say "Well, this statement in context objectively amounted to a threat to procure others to assault."

MR STUMER: Yes.

HIS HONOUR: Now, that seems to be the approach that you are taking.

MR STUMER: Yes, although I do say it is open to your Honour to also infer the subjective intent.

HIS HONOUR: Yes, it is not an easy thing to do because a lot of the evidence is not about matters that we - I can properly conclude on the evidence were, in fact, known.

MR STUMER: Yes.

HIS HONOUR: Because as you - you might not know, there is a standard direction that we give to juries about inferring states of mind and none of it will come as a surprise to a good lawyer, that you can infer - I mean, obviously no-one can know what someone's mind contains. You can infer it from objective circumstances including things they say, circumstances in which they said it and so on and so forth.

MR STUMER: Yes.

HIS HONOUR: Usually in the conduct of a criminal trial where issues of intent come up, of course, there is people giving evidence about what the defendant said and did in respect of the particular acts that are said to be accompanied by the intent. Here, there is a lot of material swirling around about things that the embassy says and Global Time says. I understand that Global Time's role and what newspapers said before that and so on and so forth.

MR STUMER: Yes.

HIS HONOUR: There is a real difficulty in inferring Mr Jie's state of mind at the time of the issue from that kind of material.

MR STUMER: Yes, respectfully I agree with that, your Honour. So the newspaper

reports, your Honour could not use those to infer the subjective intent of the consul-general because your Honour has no evidence that the consul-general had read those reports.

HIS HONOUR: Agreed. You might think, you know, it probably came to his attention but maybe it didn't either.

MR STUMER: Yes and your Honour doesn't have any evidence one way or the other about that.

HIS HONOUR: That is a proper concession, Mr Stumer.

MR STUMER: Yes.

HIS HONOUR: So are we - but anyway, you say there is other things that might lead me to infer his subjective intention was to make a threat to procure others - - -

MR STUMER: Yes.

HIS HONOUR: - - - to do certain things which has the consequence, you say - - -

MR STUMER: Yes.

HIS HONOUR: - - - because that of itself isn't said to be an offence, not the way you are running the case at the moment anyway - although there is such an offence, I think it is section 75 or something - but you say that is a threat that has the consequence of suppressing free speech and whatever and that is what takes it outside the scope of the consular function.

MR STUMER: Yes.

HIS HONOUR: And therefore outside the scope of the immunity.

MR STUMER: Yes, your Honour. Yes. That's my primary argument.

HIS HONOUR: Understand.

MR STUMER: I will say some things about the ability of your Honour to infer subjective intent but that's very much subsidiary.

HIS HONOUR: Understand.

MR STUMER: Certainly I don't ask your Honour to infer the subjective intent from anything that can't be directly linked to the respondent.

HIS HONOUR: We are on Mr Tarrant's affidavit and this is about - this exhibits various news reports.

MR STUMER: So if we start - - -

HIS HONOUR: Is it up to - sorry, you take me through it.

MR STUMER: If we start on page 5. I should note, your Honour, the original affidavit doesn't have the page numbers on it. I have had them put into your Honour's volume to make things a little smoother today.

HIS HONOUR: Thanks.

MR STUMER: If we start on page 5 of that affidavit under tab 4. You will see annexure A and then you will see that there is an article, it is dated 4 September 2019. That is after the date of the consul-general's statement.

HIS HONOUR: Was that the 24th of July or the 25th?

MR STUMER: The 25th of July was the date of the consul-general's statement.

HIS HONOUR: Twenty-fourth was the day of the events that Mr Pavlou alleges.

MR STUMER: Yes, that is right. That was the protests at the University of Queensland.

HIS HONOUR: Yes.

MR STUMER: The first article in here is one I don't press, because it comes after the statement it can't have any logical or rational connection with the statement and it is an interpretation of it. That involves pages 5 to 18 in your Honour's volume. Any references to it in paragraph 6 to 9 in the body of the affidavit - - -

HIS HONOUR: Five is the cover sheet, sorry.

MR STUMER: Yes, 5 is the one that - - -

HIS HONOUR: Just give me a second please, Mr - I just want to - leave is not sought for paragraph 6 of Mr Tarrant's affidavit and the documents referred to in it.

MR STUMER: I think it might be paragraphs 6 to 9 that refer to annexure A.

HIS HONOUR: You are right.

MR STUMER: Those paragraphs aren't pressed, nor is annexure A.

HIS HONOUR: Okay. So paragraphs 6 to 9 not pressed. Next then.

MR STUMER: The next annexure is annexure B.

HIS HONOUR: Yes, got that.

MR STUMER: B is on page 19, the article is on page 20. You will see that this one

is dated the 22nd of July so it is two days before the protests at the university and three days before the issuing of a statement.

HIS HONOUR: Sorry, Mr Stumer, I don't want to be difficult. Mine has got on the top - no, that is the day it has been printed out. Just - sorry, there it is. I've got you. I'm with you. I'm with you.

MR STUMER: It is about a-third of the way - - -

HIS HONOUR: Twenty-two July 2019.

MR STUMER: Yes. The point is there is this publication about what was happening in Hong Kong, in particular some disturbing violence in Hong Kong in the context of the protests. This is one of those things that I say is relevant to the objective interpretation of the statement.

HIS HONOUR: Well, this goes along quite a way, doesn't it? Twenty to 27, just let me have a look at what Mr Tarrant says about it. How was this reported? It says The Guardian but what are we actually talking about here? Something posted on an online newspaper website?

MR STUMER: This is taken from the online version.

HIS HONOUR: Well, there is no paper version of The Guardian, is there?

MR STUMER: Not in Australia, your Honour, no. In the United Kingdom there is but not here.

HIS HONOUR: Yes, well, there was. I don't know if it is still there, being published or not, do you know?

MR STUMER: As far as I know there is still a paper version of it, your Honour. I think I have seen - - -

HIS HONOUR: We will be there in January so I will see if I can get one. Well, I see that but this is what I wonder about - I am not averse to this really but it is a story published on an online website. Why would I infer that such a story has sufficient currency to be relevant to the way I interpret a single act by a single gentlemen on a single day in Brisbane in July 2019?

MR STUMER: Because it is part of, I am going to say, a continuum of events at the risk of being pretentious.

HIS HONOUR: That is all right.

MR STUMER: There are events that are reported from Hong Kong, it is the reporting I am relying upon rather than the event.

HIS HONOUR: I understand.

MR STUMER: They are reported from Hong Kong. There is then a demonstration organised at the University of Queensland on the 24th of July in relation to those reported events. There is then acts of violence committed during the protests and then there is reporting on the protests. Then following that there is the publication of the statement. So when one comes to interpret the statement it is relevant to know what things have been publicly reported about the events that the statement is addressing.

HIS HONOUR: There have been hundreds, thousands of things being put on web pages.

MR STUMER: Yes.

HIS HONOUR: Both for and against and about and involving different perspectives on what was occurring in Hong Kong at the time.

MR STUMER: Yes.

HIS HONOUR: I think for the purposes of resolving whether it is admissible I think it is admissible so you don't have to address me more about that for the reason you explain. I am not sure - can I just say, Mr Stumer, I am not cavilling with the proposition that there was significant social unrest in Hong Kong in the middle of 2019.

MR STUMER: Yes.

HIS HONOUR: I mean, I don't think it was so widely reported, I am not sure I would have read about it in The Guardian, but by others that the state of public knowledge in Australia about this time that there was political unrest in Hong Kong I don't think is a difficult proposition to persuade me of. Anyway, yes. Okay. I think it is relevant. What did you want to say next about it?

MR STUMER: Once it is relevant it is just part of the story. When one comes to interpret it in the statement, it is one of the less relevant parts of the story but it is the beginning of the story otherwise the rest of it becomes difficult to understand.

HIS HONOUR: So this is why - surprised you took me to the propositions which I accept anyway - which is well this could have been put before her Honour and it wasn't.

MR STUMER: Yes.

HIS HONOUR: But well, why should I give leave, Mr Stumer? I must say I am not particularly against the idea but - - -

MR STUMER: Partly for the reasons that your Honour was earlier explaining that - - -

HIS HONOUR: That will teach me to - - -

MR STUMER: - - - the way that matters of this kind come before the Magistrates Court is often in a way that means some material facts might not come before the Magistrates Court. So in my respectful submission, your Honour would be less inclined for that reason to hold out material that could have been available but wasn't available.

HIS HONOUR: Do you know - I am inclined to agree with that in this unusual case, Mr Stumer. But doesn't that - and I very much appreciate the time you spent in structuring this in a way that is going to make sense for me because it does have its complexities.

MR STUMER: Yes.

HIS HONOUR: But can I jump to another topic just for a moment? If I let you put on further material on the appeal it would be for the purpose of persuading me that her Honour erred, and I say that in a formal sense because that was the only submission made to her, of course.

MR STUMER: Yes.

HIS HONOUR: Erred in concluding the matter should be summarily dismissed because of the jurisdictional point, okay, or to persuade me there is a sufficiently arguable case for me to give you leave. But you remember a couple of weeks ago we discussed the question about me then - if I were to conclude that her Honour had erred and necessarily that the case, as articulated in admissible evidence took it outside the scope of the immunity - - -

MR STUMER: Yes.

HIS HONOUR: - - - that I wouldn't go ahead and determine it in substance because Mr Jie, consistent with established legal principle, didn't come in circumstances where the jurisdictional exclusion at least arguably, strongly arguably one might think, arose. I am not saying that you can't turn it around today but - and I said to you look, I am not being inclined to just go ahead. I mean, you made the point he has been served, he is not here, so that's that.

MR STUMER: Yes.

HIS HONOUR: But if I let you put on fresh material that hasn't been served at least on the trial - - -

MR STUMER: Yes.

HIS HONOUR: - - - I see you are going to come to an affidavit where you serve - - -

MR STUMER: It has been served on the appeal, yes.

HIS HONOUR: It has been served on them now but of course, this is just an appeal on the jurisdictional issue.

MR STUMER: Yes.

HIS HONOUR: If more material comes in that is all the more reason why I would not be inclined to go ahead. I just flag that.

MR STUMER: Yes and - - -

HIS HONOUR: The purpose in the first instance of course is to win the appeal, so - - -

MR STUMER: Yes and - - -

HIS HONOUR: Your purpose that is.

MR STUMER: Respectfully, your Honour's first point was if you decide that the court, in fact, does have jurisdiction then it might be said that the consul-general should be given an opportunity to respond to the substance of the matter having heard the court's ruling about jurisdiction. So I understand that, your Honour.

HIS HONOUR: Yes.

MR STUMER: The answer is that he is very unlikely to come in any event so that your Honour could proceed to exercise the discretion, in my submission.

HIS HONOUR: Yes, anyway, I am not asking you to concede anything, Mr Stumer, I am just saying that the more material that goes in that wasn't even remotely before her Honour the more that seems like it might be the course I have to follow.

MR STUMER: Yes.

HIS HONOUR: That's B. All right. Next - and the paragraphs related to it. Next one?

MR STUMER: The next - there is then C and D, your Honour which are really in the same category as The Guardian article we have been looking at. One is an ABC news report, the other is a Brisbane Times report. It is just the same point that there is reporting of violence. If your Honour - I won't ask your Honour to do this now but reading the articles there is some ambiguity in the articles about whether the violence is coming from the pro-Hong Kong protestors or the pro-Beijing protestors if I can put it that way.

HIS HONOUR: These are - this is in respect of what is happening in Hong Kong, these articles?

MR STUMER: No, these articles are - - -

HIS HONOUR: Are about what happened in Brisbane?

MR STUMER: Yes, C, D and E, I think it might be all about what happened on 24th July. These are the ones - - -

HIS HONOUR: There are other articles about this which were already I think in Mr Pavlou's original - one of his original affidavits - newspaper articles. Maybe not. Maybe I just read it in your submissions and you are relying on some of this material.

MR STUMER: My submissions do rely on this material.

HIS HONOUR: Right. That is probably where I got it, Mr Stumer, otherwise you probably wouldn't need to do this. That is a factor which has struck me in analysing the persuasiveness of some of your five enumerated points as to why I should infer this document amounts to a threat to procure to assault.

MR STUMER: Yes.

HIS HONOUR: But you know what? Let's come to that when we come to it.

MR STUMER: Yes, in very short terms there is a line which says:

> *I affirm the self-motivated patriotic behaviour of the overseas Chinese students.*

And the question is - - -

HIS HONOUR: That is your first point in your submission.

MR STUMER: Yes.

HIS HONOUR: And it is probably your best one - - -

MR STUMER: Yes.

HIS HONOUR: - - - in my respectful opinion, well, subject to hearing more oral argument about them. So that led - - -

MR STUMER: I will take your Honour to that.

HIS HONOUR: - - - in fact, that is what led me to start poking around to try and find whether I could find on the material that Mr Jie must have been referring to the alleged assaults on Mr Pavlou.

MR STUMER: Yes.

HIS HONOUR: So if there is a melee there is lots of things going on. If there are objectively other things that were happening to which he could be referring, it might

arguably be thought that one is - I don't say this critically - but cherry picking an accident out of a series of incidents.

MR STUMER: Yes.

HIS HONOUR: If the public narrative, for example, is the Chinese - the pro-sending State persons were protesting and the Australian people were protesting and it got heated or the - you know, anything could have happened then you might say well, how can I pick the one that makes it look like a threat when the objective evidence is that there is other things to which it could be referring? So I had thought about that.

MR STUMER: Yes and respectfully your Honour is right to do so. I am not suggesting that these things are easy.

HIS HONOUR: That is right, I wasn't disappointed to end up with this matter.

MR STUMER: The point that I make about the three articles about the event is that while there is some ambiguity at points in those articles there is certainly, when it comes to descriptions of the event that seemed to be the event involving Mr Pavlou, they involve aggression and initiation by the pro-Beijing protestors in the articles. That is the point that I would make. Looking at the consul-general's statement objectively it does not draw any distinction between acts of, say, chanting by pro-Beijing protestors or playing music and acts of assaulting the pro-democracy pro-Hong Kong protestors. So when one looks at it objectively it is at the very least a careless statement. And then when one looks at the consequences that followed from it and the threats that were made to Mr Pavlou it is objectively a statement that had negative consequences for - - -

HIS HONOUR: There is an issue about that of course which I know you will have already thought about and that is just because B happens after A doesn't mean A caused B.

MR STUMER: Yes.

HIS HONOUR: And the material I've looked at, it is a little bit difficult because you have to try and put out of your mind things that you have read just as a person who follows what is going on - focus on these particular things that are in the material. But even the material I've read I think here gives one reason to think there might be many other activities of Mr Pavlou's critical of the sending state and I, as a judge, have no opinion about any of those activities either way. My only interest in them is that there has been many other activities that might give cause for people who associate themselves with the interests of the sending State to get involved in being difficult towards him.

MR STUMER: Yes.

HIS HONOUR: So there is a causation issue and the longer that goes past after it the more ephemeral, the more difficult the argument that this one-off statement from

a consul-general - with respect to him of course, he is not the Chinese ambassador, a consul-general position I know is different from an honorary consul position, there is lots of honorary consuls kicking around Brisbane but still - so we then get to, for example, Mr Pavlou's evidence as to what occurred to him in London to segue back to where we have started this part of the argument and I think it is impossible, quite impossible to link that to being caused by something said on one page posted by one - with respect to him - minor is the wrong word but a person not at the top of the diplomatic tree.

MR STUMER: Yes, I mean one might call Australia a minor outpost of the diplomatic or consular world.

HIS HONOUR: That wouldn't be fair, 12th biggest economy in the world, you know.

MR STUMER: I beg your pardon?

HIS HONOUR: Twelfth biggest economy in the world, you know.

MR STUMER: Yes, I stand corrected.

HIS HONOUR: I think we have just gone past Russia. Sorry, Mr Stumer I am being flippant.

MR STUMER: I think a former Prime Minister may have had something to say about Australia's standing in the world which I won't repeat.

HIS HONOUR: Yes.

MR STUMER: Your Honour, with respect, plainly understands the point I am making.

HIS HONOUR: Yes. Anyway, perhaps we could round it off this way: on the basis you articulated I am not sure I am persuaded by it but I can see that on the way you want to develop your argument it is relevant, sufficiently relevant, and given the way the case has developed - notwithstanding this could have been put before the magistrate - I am content to give you leave to rely on it in the application for leave and the appeal, Mr Tarrant's affidavit, other than paragraphs 6 to 9. Is that where you were trying to get to, Mr Stumer?

MR STUMER: It was, other than paragraphs 6 to 9.

HIS HONOUR: Other than paragraphs 6 to 9, yes, and the attachments referred to therein.

MR STUMER: Yes.

HIS HONOUR: Mr Pavlou's affidavit I have given leave in respect of para 12 and we will see about the rest later.

MR STUMER: Yes.

HIS HONOUR: Having ruled on that, Mr Tarrant's affidavit I have given leave - that is the affidavit sworn 12 May 2022, I have given leave for the whole of that affidavit other than paragraphs 6 to 9 and the attachment referred to therein.

MR STUMER: Yes.

HIS HONOUR: Right. What next, Mr Stumer?

MR STUMER: The next document is under tab 6. It is another affidavit of Mr Tarrant. This one sworn 8 August. I won't take your Honour through all the documents in this. Essentially it contains the procedure of what happened below.

HIS HONOUR: Yes.

MR STUMER: Including the Chinese Embassy memorandum and the letter from DFAT. I should correct one point that I made to your Honour on the last case.

HIS HONOUR: Yes.

MR STUMER: I think I said to your Honour on the last case that DFAT forwarded the Chinese Embassy memorandum - - -

HIS HONOUR: To be fair I think I verbaled you with that because the way it looked in the appeal book that had been prepared for me it looked like the embassy submission was attached to the letter.

MR STUMER: Yes.

HIS HONOUR: So I might have led you into error, Mr Stumer, if that was an error.

MR STUMER: I think it was an error. It was my fault, with respect, because I had misunderstood it. If your Honour comes to page 41 of the exhibits and again those page numbers don't appear in the original, I haven't inserted them.

HIS HONOUR: That is all right, Mr Stumer.

MR STUMER: If you look at the very bottom of page 41 there is a letter from the embassy and it says at the bottom that it is copied to the Brisbane Magistrates Court so - - -

HIS HONOUR: So that's how it got - yes, in fact, doesn't her Honour say something like, "This was provided to me."

MR STUMER: Yes, I think in the transcript.

HIS HONOUR: Yes and I read that and I thought no, it was provided by The

Australian. But anyway, not much turns on it, does it?

MR STUMER: No, I think I just misled your Honour about that. If your Honour comes back to page 39, that's the letter from DFAT. It doesn't appear to annexe the Chinese Embassy memorandum. All that it is doing is really saying that Dr Jie is an accredited consular officer so that the court knows the Government of Australia's position - - -

HIS HONOUR: The statutory pre-conditions to section - article 43(1) are met.

MR STUMER: Yes and the general principle is that when the receiving State acknowledges the consular status of the consul that is binding on the court and the court can't look beyond it. That is really the relevance of the letter from DFAT.

HIS HONOUR: Yes, that would be really a prerogative issue the court wouldn't go behind.

MR STUMER: Yes.

HIS HONOUR: It is up to the Crown to say who the Crown recognises as a consular official subject to, you know, bad faith and fraud or whatever.

MR STUMER: Yes, I accept that is right. Sorry, your Honour, the affidavit of Mr Tarrant that we are looking at, it is really just a convenient way of gathering together some of the material - - -

HIS HONOUR: Look, I don't cavil with it. I just wonder whether you really need leave because this is - this goes to matters that need to be explained for the purposes of conducting the appeal.

MR STUMER: Yes.

HIS HONOUR: Anyway well, to the extent you do - just one thing though, I don't mind if you want to include them but what is the point of me knowing about all these subpoenas? You are going to say "I am not really going to take you to it, we will just" - doesn't matter I will just give you leave if you need it.

MR STUMER: I am not going to take you to the subpoenas.

HIS HONOUR: All right. I give you leave to the extent it is required to rely on Mr Tarrant's affidavit sworn 8 August 2022. Next.

MR STUMER: Thank you, your Honour. The next affidavit is under tab 8.

HIS HONOUR: This is your affidavit of service?

MR STUMER: That is right.

HIS HONOUR: Well, I don't think you need leave for that but to the extent you do

I give you leave to rely on the affidavit of Ms De Kruis sworn 30 September 2022.

MR STUMER: Yes. Thank you, your Honour. Next is under tab 9, it is an affidavit of Mr Pavlou sworn 4 October 2022.

HIS HONOUR: Yes.

MR STUMER: Again, it largely goes to the continuing fear - - -

HIS HONOUR: I read this.

MR STUMER: Yes. Your Honour may be thinking that it doesn't link the fear to the consul-general so I have to address your Honour about that. That is the relevance of it.

HIS HONOUR: Okay. I understand. So it is really just all about paragraph 12 of Mr Pavlou's two affidavits that you need to deal with in terms of admissibility; correct?

MR STUMER: Yes, your Honour. Is it convenient to deal with it by way of submissions? If your Honour's - the oral submissions I make today, that is.

HIS HONOUR: Sure, whatever you want.

MR STUMER: If your Honour is satisfied at the end that it is admissible and relevant, relevant and admissible, then your Honour would let it in. If your Honour is not satisfied - - -

HIS HONOUR: We will kick that can down the road, Mr Stumer.

MR STUMER: Yes.

HIS HONOUR: There is one more affidavit though I see.

MR STUMER: There is. This is the one I handed up this morning.

HIS HONOUR: Right. Yes.

MR STUMER: I think I invited your Honour to slip it into the bundle - - -

HIS HONOUR: I did. I have done that.

MR STUMER: This is the most recent affidavit of Mr Tarrant. This affidavit, the first two paragraphs and the annexures are just about informing the court of our present understanding of the location.

HIS HONOUR: All right. Right.

MR STUMER: See, this is where this whole - look, believe me I don't want to

make some harder than it is but this is where this whole question about how do you deal with admissibility where as far as I can work out, because I have had to look at this for the purposes of working out whether I can ignore the fact that evidence is inadmissible on an ex parte, as it necessarily is, application for substituted service, right?

MR STUMER: Yes.

HIS HONOUR: So I have gone looking for somewhere where, acting according to law, one can rely in a civil matter on evidence which is inadmissible - - -

MR STUMER: Yes.

HIS HONOUR: - - - if there isn't somebody else to say "we don't object", because if you think about it that is how 99 per cent of what is technically inadmissible gets in in commercial cases.

MR STUMER: Yes.

HIS HONOUR: And I am not sure that there is such a power because - do you remember there used to be - it might have been a little bit before your time maybe - in the original UCPR in 1999 - I don't know if you were practicing then but they had - there was a rule that said the court doesn't have to apply the rule of evidence if it chooses not to or something like that.

MR STUMER: Yes.

HIS HONOUR: And it was removed and then they enacted that 129A, 132A or something in the Evidence Act which says for these uncontentious things you don't have to prove it strictly according to Hoyle.

MR STUMER: Yes.

HIS HONOUR: But there was never any re-enactment of some general power to not apply the rules of evidence.

MR STUMER: No.

HIS HONOUR: Which - so Mr - I mean, Mr Tarrant's evidence is he understands that Mr Jie is the ambassador in Cape Verde, he's made inquiries, this is what it said publicly.

MR STUMER: Yes.

HIS HONOUR: I mean, I don't have any doubt that's true.

MR STUMER: Your Honour possibly could admit it under section 92 as in it is a statement made by a person who would be expected to have knowledge of the facts. That is the author of the website and - - -

HIS HONOUR: That is true, you could.

MR STUMER: - - - 92(2)(f), it is not convenient - - -

HIS HONOUR: Not convenient to call - - -

MR STUMER: - - - to call them.

HIS HONOUR: That will do, Mr Stumer.

MR STUMER: Yes.

HIS HONOUR: Anyway, it just seems there needs to be some statutory provision which deals with this.

MR STUMER: Yes.

HIS HONOUR: So he is, as Mr Tarrant helpfully explains to the court, he's the ambassador in Cape Verde. Well, one and two I understand.

MR STUMER: Yes.

HIS HONOUR: Three.

MR STUMER: Three is just another question of service.

HIS HONOUR: All right, probably didn't get a response.

MR STUMER: We did not get a response - - -

HIS HONOUR: Really?

MR STUMER: - - - as I understand it. Four relates to the hard drive that I handed up to your Honour today. Five - - -

HIS HONOUR: Yes, what is this bit about?

MR STUMER: This is - your Honour may recall from my written submissions that article 5M sets out that a consular function is anything entrusted to the consulate provided there is no objection by the receiving State.

HIS HONOUR: I didn't see how that - I mean, can I make this - I think this might make it easier for you because although jurisdiction is a matter for me and although the consul-general, if he is evoking the jurisdictional exclusion, doesn't have to [indistinct] that Jermyn case and so on, if you don't come along, right, and 2M involves identifying something that only you as consul-general could know, you can't really complain if the court goes "Well it can't be 2M because there is no evidence of it before me."

MR STUMER: Yes, so the main point about article 5M - - -

HIS HONOUR: Yes - 5M, sorry. I don't know where I got 2 from.

MR STUMER: There is no evidence at all that the functional issuing statements, whether political statements or any statements at all, have been entrusted to the consul-general. That is my primary point about 5M.

HIS HONOUR: Yes, I just don't see how I could conclude it was.

MR STUMER: No, respectfully your Honour is correct about that.

HIS HONOUR: So is that what 5 - - -

MR STUMER: In any event if your Honour was against me on the primary argument - - -

HIS HONOUR: Yes.

MR STUMER: - - - 5 and 6 are about putting in an admissible way the statement by the Minister. Mr Pavlou's affidavit - - -

HIS HONOUR: That is right, you don't have to say anything more about it. Five and 6 I will - at the end I will give you leave about this affidavit but at the moment I give you leave for 1 to 6.

MR STUMER: Thank you, your Honour. We then come to paragraph 7 of annexure E which I don't press.

HIS HONOUR: Which you, sorry?

MR STUMER: Which I don't press.

HIS HONOUR: So 7 is out. In that case I give you leave to rely on the appeal, to the extent required, on paragraphs 1 to 6 of Mr Tarrant's affidavit sworn 21 November 2022.

MR STUMER: And the annexures therein?

HIS HONOUR: And the annexure referred to therein, yes, of course. Right. That is stage 1.

MR STUMER: That brings us to the end of phase 1 of the submissions, your Honour.

HIS HONOUR: I am sure we will accelerate, Mr Stumer. We have ventilated lots of incidental points.

MR STUMER: That is the plan, your Honour, because I have taken your Honour to much of the material we've - I have made submissions about the relevance of it so I am not planning to take your Honour back to it all again.

HIS HONOUR: Of course not.

MR STUMER: So I do want to take your Honour to Mr Pavlou's affidavit that was before the Magistrates Court. It is in part A tab 2.

HIS HONOUR: Yes.

MR STUMER: This is the affidavit that was relied upon to have the summons issue by the Justice of the Peace.

HIS HONOUR: Yes, a strange notion of substantiating but for the purpose of the issue of a summons. I was discussing it with a colleague and they suggested it was somewhat analogous to getting a search warrant issued. You can rely on anything rationally probative, it has to be sufficient to sustain the reasonable submission.

MR STUMER: I see.

HIS HONOUR: Anyway, I digress. I am looking at that affidavit.

MR STUMER: I just wanted to direct your Honour to paragraphs 3 to 5. If your Honour would take just a moment to read those paragraphs again.

HIS HONOUR: Yes. Yes, I mean, I read them again this morning before court. Your submission to me is that for the purposes of this jurisdictional question I should accept that as correct.

MR STUMER: Yes, your Honour.

HIS HONOUR: Because the question is whether the alleged act is an act that falls outside the scope of the jurisdictional exclusion.

MR STUMER: Yes, yes.

HIS HONOUR: I also note though, Mr Stumer, the point that I made before when it comes to causation, even as at the time of the application originally by Mr Pavlou, and again I emphasise the wisdom or otherwise or justification or otherwise of any of this protest, it has nothing to do with this hearing, but he is an organiser of multiple Queensland pro-Hong Kong democracy rallies so in a neutral way he had form for vociferous criticism of the Chinese State. As I say you are allowed to protest in this country but it goes to that question of causation.

MR STUMER: Yes.

HIS HONOUR: Perhaps not very much but that's the idea that occurred to me.

MR STUMER: I mean, in terms of the initial set of threats that are made that are in annexure I some of them are dated, for example, 1 August, 25 July on page 22. The very very close proximity between the issuing of this statement, its reporting in the Global Times and the threats, I understand that - - -

HIS HONOUR: Why as a matter of causation wasn't that caused by the riff on what might have been thought to be the more careful words of the consul-general in the Global Times article which saw fit - one might wonder why - but saw fit to identify the applicant personally.

MR STUMER: To identify, yes. Yes.

HIS HONOUR: Anyway, look, I have - I am either persuaded or not I guess about whether A causes B.

MR STUMER: Yes. Respectfully your Honour's very right to be careful about the causation issues.

HIS HONOUR: But you know, Mr Stumer, if it is sustained on the material well if it be, that's it.

MR STUMER: Yes.

HIS HONOUR: Three to 5, yes, I understand.

MR STUMER: The video that I've given to your Honour, there are several videos on there but one of them I think it is the title of the video is "Drew Pavlou assaulted" shows what happened in the assault that is described in paragraph 4. I won't ask your Honour to look at it now but it is something that your Honour might look at in chambers.

HIS HONOUR: I probably will. Is there - can you identify a title of video in relation to the alleged assault in 5, Mr Stumer?

MR STUMER: No. I've looked at all the videos. There is another one that involves a throwing of some water which Mr Pavlou is involved in. That is the water is thrown in his direction. There doesn't seem to be a video of a masked man striking him in the back of the head, ripping up a poster.

HIS HONOUR: Anyway. And the stick that I've been given, Mr Tarrant says, I think, were the videos that were filed in the Magistrates Court.

MR STUMER: Yes.

HIS HONOUR: On the substantiation stage.

MR STUMER: Yes, that is right. I think he says they were filed in February 2020 so they were on the court record at the time of the hearing.

HIS HONOUR: Yes.

MR STUMER: Now, your Honour, we have already dealt with the reporting about the incident. I have addressed your Honour about the relevance of that. But then we come to the - - -

HIS HONOUR: Can I say just in respect of paragraph 6, it doesn't really matter but it is not admissible for Mr - for the applicant to characterise the statement in the way he does.

MR STUMER: No.

HIS HONOUR: Not that it is going to affect me.

MR STUMER: No, your Honour will form your own interpretation of the statement.

HIS HONOUR: We don't have to talk about stuff like that.

MR STUMER: Your Honour, if we then come through to page 7 you will see a Chinese language version of the statement. Then on page 8 there is a translation. On page 9 is the certificate of the translator.

HIS HONOUR: Yes, I am not troubled by the proposition that that is an admissible translation.

MR STUMER: Yes, thank you.

HIS HONOUR: Although can I say this: we hope that part, having done quite a few trials with interpreters in the criminal jurisdiction, including languages that are very different from English, I'm cautious about treating the translation "we hope that overseas Chinese students will abide by" as being, in effect, what might be colloquially called a dog whistle hope. It is said that we hope that so and so is going to happen square brackets but if that doesn't happen good on you. You know?

MR STUMER: Yes.

HIS HONOUR: Now - I don't say your submissions are that unsubtle, Mr Stumer, but you do make the point that it doesn't say:

*Overseas Chinese students must abide by Australian law.*

Okay?

MR STUMER: Yes.

HIS HONOUR: I am cautious, in a translation from a language so extraordinarily different from English, to draw that subtle distinction on a translation - - -

MR STUMER: Yes.

HIS HONOUR: - - - when the rest of the sentence is quite clear. If we left out, "We hope that" and said that:

> *The overseas Chinese students will abide by the Australian laws and regulations and to express their appeals and demands in accordance to the law.*

I mean, again, you can see the way some the subtleties of that translation don't quite gel grammatically.

MR STUMER: Yes.

HIS HONOUR: I mean "we hope that" might just be an implication that he's put in front of statements in - I guess it was Mandarin?

MR STUMER: Yes.

HIS HONOUR: So although I accept the admissibility and accuracy of the translation I have a little reservation about your perfectly justified and understood critique based on that last sentence for that reason.

MR STUMER: Yes, I mean, if one is using English idiom there are lots of ways to make an implied threat. So that a classic implied threat of a gangster is, "This is a nice place you've got here. It would be a shame if something happened to it."

HIS HONOUR: Yes.

MR STUMER: English speakers would understand that to be a threat.

HIS HONOUR: Exactly, if it was translated by a translator into Chinese in a way that didn't have that idiomatic understanding of that precise language a Chinese court might be saying, "I don't know what you are talking about. He said it would be a shame if something happened to your property."

MR STUMER: Yes.

HIS HONOUR: "That's not a threat."

MR STUMER: Yes.

HIS HONOUR: Look, I don't want to push it too far, Mr Stumer, but I did want to flag that I am not overly persuaded that that part of the statement indicates a hope for the opposite to happen to that which is hoped.

MR STUMER: No, I understand what your Honour is saying.

HIS HONOUR: I understand the submission, it is fair enough.

MR STUMER: Yes, my submission isn't so much that it is - that those words are themselves an implied threat.

HIS HONOUR: No.

MR STUMER: I don't make that submission - - -

HIS HONOUR: No.

MR STUMER: - - - for the reasons that your Honour has explained, with respect, but it could have been and ought to have been, in my respectful submission, ought to have been clearer.

HIS HONOUR: To which I say it could be and perhaps is clearer if one has an understanding of the idiomatic place that "we hope that" might have or whatever was translated is "we hope that".

MR STUMER: Yes.

HIS HONOUR: Now, I don't want to press this too far. I understand that perfectly well, Mr Stumer. But it is a very subtle - for example, maybe the words "could" and it is a question of expert opinion, a translation, anyway, and I am not claiming to have one but I am just saying that maybe it could be translated as "it is our expectation that. We hope. We expect" who knows how that happens.

MR STUMER: Yes.

HIS HONOUR: As I say, you can't press that too far but in the context of the rest of the sentence - - -

MR STUMER: I mean, if we had the respondent appearing the respondent might have been able to put forward a subtly nuanced different interpretation that puts a different spin on it.

HIS HONOUR: Indeed. I have had actually a voir dire about the different ways the same word could be translated in a trial involving Kirundi evidence which is the language of Burundi in Central Africa. So that is the way you solve that problem.

MR STUMER: Yes.

HIS HONOUR: Anyway, we digress. What did you want to say next? You took me to this and you took me to the translation which made me think of the only translation issue that I had come up with that I wanted to flag to you. So next step?

MR STUMER: Yes. Thank you, your Honour. So in my written submissions at paragraphs 69 to 80 I have drawn attention to five features of the statement that are important.

HIS HONOUR: Yes.

MR STUMER: I am not going to repeat everything I have said in writing but just some things to emphasise.

HIS HONOUR: Can I just get the one I have marked up in front of me please, Mr Stumer. Right. I am at your paragraph 69. What is the next thing you wanted to - - -

MR STUMER: Yes, your Honour. I wasn't going to go through specifically the things in that order but the things to emphasise are the words "affirm as to self-motivated patriotic behaviour".

HIS HONOUR: Yes, that brings me - sorry, you finish what you wanted to say about that.

MR STUMER: What I was going to say is that it doesn't draw a distinction between the lawful acts of counter protest that occurred on 24 July and the acts to suppress the pro-Hong Kong democracy protestors that occurred on that day. And it ought to have done, in my respectful submission. That has been created - - -

HIS HONOUR: Is that a subtle concession that lots of things happened on that day that could be covered by the description "self-motivated patriotic behaviour"? That there is a number of things that happened that could fill within that description even on the applicant's version of events and so the complaint is why there are more than just these two incidents. What it should have done is distinguish between the two incidents that arguably give rise to unlawful assaults argument, at least on the facts alleged and the other things that happened.

MR STUMER: Yes. So - - -

HIS HONOUR: I made that sentence too long, I'm sorry.

MR STUMER: No, but I think I understand your Honour's questioning and concern.

HIS HONOUR: Is it a concession that more than just the assaults happened that could be covered by this statement but the statement should have excluded the assaults?

MR STUMER: Yes, it is. But can I make this further point - - -

HIS HONOUR: Yes, yes, I want you to make all the points you want to make about this, Mr Stumer.

MR STUMER: Your Honour called it a subtle concession and it is a concession in the sense that more things than the assaults happened on the day.

HIS HONOUR: Yes, sorry, I am not trying to verbal you. But one then has to ask

why was that statement issued and in my respectful submission it must have been in response to the reporting of what had happened on the 24th of July. This is where the reporting becomes important because the reporting includes a reporting of the assaults and the initiation of violence and intimidation by the pro-Beijing protestors. So if there had been a friendly discussion at the University of Queensland on the 24th of July there would have been no reason for the consul-general to issue a statement. It is precisely because things had escalated that your Honour might infer the consul-general issues the statement.

HIS HONOUR: Well, just let me think about that because that is real, real, real important to your case, isn't it?

MR STUMER: Yes, your Honour and that's respectfully why I took some trouble in trying to convince your Honour that the reporting was admissible.

HIS HONOUR: I understand.

MR STUMER: Because it is significant to the context of the publication of the statement.

HIS HONOUR: Yes, well, there is other rational explanations, the consul-general might have had a different version of events. The fact that someone alleges an assault doesn't mean there is an assault. There is, it seems, sometimes like a quarter of the Criminal Code is full of defences to assault: provocation, self-defence - - -

MR STUMER: Yes.

HIS HONOUR: - - - defence of another.

MR STUMER: Yes.

HIS HONOUR: It may be that he had a different report of what happened.

MR STUMER: It may be and that - - -

HIS HONOUR: And I only say that - I know I can't speculate but equally I have to be persuaded - - -

MR STUMER: Yes.

HIS HONOUR: - - - positively of a fact.

MR STUMER: Yes.

HIS HONOUR: And it may well - you say infer the purpose and context of this statement from what was in the paper. Maybe the consul-general had a different report.

MR STUMER: Yes and this might bring us back to that subjective/objective

distinction that your Honour raised earlier.

HIS HONOUR: Yes.

MR STUMER: To the extent I am inviting your Honour to infer the subjective intent of the consul-general what I can't rely on is those newspaper articles. To the extent I am asking your Honour to determine the objective meaning of the statement, in my respectful submission one can rely upon them because they are public reporting that provides the context for the statement.

HIS HONOUR: Well, yes, in that context it was at least - actually, I won't say anything. Keep going.

MR STUMER: The next thing to emphasise in the final paragraphs is the words:

> *Will firmly safeguard the legitimate rights of the overseas Chinese students.*

Now an interpretation of that - - -

HIS HONOUR: Wait a minute. That's dealt with in your fourth point.

MR STUMER: That may be right.

HIS HONOUR: That is all right, Mr Stumer. You just keep - I've got it here. Yes, yes.

MR STUMER: So - - -

HIS HONOUR: On your fourth point, just let me see what I wrote. You are right to come to that because at least on a preliminary basis I couldn't quite draw those inferences from that sentence:

> *The Consulate-General will continue to pay close attention to monitor this matter and will firmly safeguard legitimate rights of overseas Chinese students.*

MR STUMER: Yes.

HIS HONOUR: I can infer A that they continue to monitor pro-Hong Kong protestors but that is, to my mind, completely benign and exactly what a consul-general would do if Australia was the object of critical protests in another country.

MR STUMER: Yes.

HIS HONOUR: So it is B, that is in your outline 77B.

MR STUMER: Yes.

HIS HONOUR: That seems like a bit of a leap, Mr Stumer. But I tell you that so you can talk me into it.

MR STUMER: Yes, well it's - it comes from the combination of the "affirms the self-motivated patriotic behaviour". So we affirm that behaviour. In effect, we say that's good, one might say, legitimate behaviour. Then "We will firmly safeguard the legitimate rights of the overseas Chinese students," in the context of the earlier words is saying - - -

HIS HONOUR: The violence was legitimate and we will support you in other legitimate violence.

MR STUMER: Yes.

HIS HONOUR: I understand the submission.

MR STUMER: To put it colloquially, "We'll have your back if you keep engaging in that sort of conduct against anti-Beijing protestors."

The next thing to draw your Honour's attention to is the use of what I will describe as some highly-charged language in the statement. I will have to explain and unpack that a little bit. But it is in particular the references in the introduction to anti-China separatist activities.

HIS HONOUR: Yes, again, I read that. I read the - can I say the first thing is that you don't under the translations of the Code that I read, there is only - the standard sentence for procuring people to conspire to break up the sovereign State of the sending State is five years.

MR STUMER: I wasn't planning to take your Honour to the Chinese law because I am not an expert in the Chinese law and, respectfully to my client, he also isn't an expert in the Chinese law. So I don't invite your Honour to rely on the statutes that are annexed to Mr Pavlou's affidavit.

HIS HONOUR: Fair enough.

MR STUMER: What I do ask your Honour to rely on is a report of Professor Barme of the Australian National - - -

HIS HONOUR: Just one second.

MR STUMER: It is under - - -

HIS HONOUR: Hold on, sorry, Mr Stumer. I just have to make notes of this that link it to my own notes or when I am sitting in chambers I won't be able to remember, he said something about this but I can't remember what. Just hang on a second. Right. Now, yes, you wanted me to look at?

MR STUMER: It is the report of Professor Barme, it is under tab part A. This is part of the material that was before the Magistrates Court.

HIS HONOUR: Why is this admissible? What is it? Is it supposed to be an expert report?

MR STUMER: It is supposed to be an expert report.

HIS HONOUR: And going to what issue?

MR STUMER: Going to the proper way to interpret the statement and can I say there is only parts of it that I'm going to ask your Honour to act upon.

HIS HONOUR: Can you identify them for me? Because, in the absence of doing a careful review, I thought the whole thing was inadmissible and irrelevant. But that was a preliminary view, Mr Stumer. I am listening to you.

MR STUMER: Yes, the vice in the Hamilton affidavit is that it tries to draw inferences about the state of mind of the consul-general.

HIS HONOUR: Yes, that is the vice.

MR STUMER: Which is inadmissible and I accept and that is why I didn't press that part of the affidavit. This report at times makes similar sorts of errors. The parts of the report that I ask your Honour to rely upon - - -

HIS HONOUR: You know what? Let's have a break for five minutes.

MR STUMER: Yes, your Honour.

HIS HONOUR: Actually 10 minutes, I will come back at five to 12.

**ADJOURNED** **[11.46 am]**

**RESUMED** **[11.57 am]**

HIS HONOUR: Emeritus Professor Barme's report.

MR STUMER: Yes, your Honour. Can I just identify the parts of the report that I rely upon? If your Honour would come to the first page of the report - - -

HIS HONOUR: Yes.

MR STUMER: - - - keeping in mind Professor Barme, according to the report is a Director of the Australian Centre on China in the World and the Australian National University.

HIS HONOUR: Where do I see that?

MR STUMER: It is at the end of the report, your Honour, with his signature.

HIS HONOUR: Right. Sorry.

MR STUMER: So he, in my submission, this is his field of expertise is China, Chinese politics and international - - -

HIS HONOUR: What is the field of expertise do you say exactly?

MR STUMER: The field that I am going to be relying upon is the meaning of the use of certain words in the context of Chinese politics.

HIS HONOUR: Now, I have a difficulty with the idea that that is an established area of specialised knowledge and training because, as I am sure you know, the fact that people do training and have specialised knowledge about something doesn't mean that it is a field of specialised knowledge and training for the purpose of giving expert opinion evidence.

MR STUMER: Yes.

HIS HONOUR: The meaning of the use of certain words in Chinese politics. Anyway, I asked you to tell me what you said the area of speciality was - expertise was and you told me.

MR STUMER: Yes.

HIS HONOUR: Next point?

MR STUMER: Can I just identify the parts I am relying on because some of it goes beyond what, in my submission, would be admissible expert evidence. But some of it does go to these matters. Your Honour, I understand Professor Barme is fluent in Chinese. I don't have the evidence about that but you can see that he does use a lot of Chinese characters throughout the report suggesting he is capable at least of identifying Chinese characters and giving them an English interpretation.

HIS HONOUR: Well, yes except, of course, there's both an administrative - well there's an established judicial understanding about how good you have to be in speaking something or understanding it to interpret or translate.

MR STUMER: Yes.

HIS HONOUR: Anyway, go ahead.

MR STUMER: There is a fine distinction I am trying to draw here, your Honour - - -

HIS HONOUR: And I will stop interrupting you so you can draw it.

MR STUMER: Yes. There is general statements he makes about certain words and then there are other statements he makes about the meaning of the consul-general's statement.

HIS HONOUR: Sorry, can you just say that again?

MR STUMER: There is general statements that Professor Barme makes about the meaning of words, in particular separatism and the connotations of that. That's the parts I am asking your Honour to rely on. In other parts he purports to advance an interpretation of the consul-general's statement. I don't rely on it for that purpose because ultimately it is a matter for your Honour to interpret the statement and not strictly a matter of expertise. But in effect the sort of evidence that I am asking your Honour to take into account is factual evidence, not necessarily even opinion evidence but factual evidence within the field of expertise within the field of Professor Barme. As your Honour will recall, there are - - -

HIS HONOUR: Non-opinion expert evidence.

MR STUMER: Yes, your Honour. What I was going to say is that your Honour will recall there is often a bit of a continuum between when an expert is describing facts within their field they can venture off into opinion, the opinion will be admissible as long as they are within their field. But really what I am trying to do is the non-opinion expert evidence.

So the first part that falls within that category is the very first paragraph of the report.

HIS HONOUR: What does that mean "to China official":

*According to China official Communist words.*

MR STUMER: "According to China, official communist words."

HIS HONOUR: Right.

MR STUMER: That is the way to read it.

HIS HONOUR: It sounds like, I say this respectfully, but English mightn't be Professor Barme's first language either.

MR STUMER: The name suggests perhaps.

HIS HONOUR: Anyway, it is important to appreciate. Yes, so the first paragraph.

MR STUMER: Yes, then the next part is over on the second page of the report. It is the last paragraph there which talks particularly about the meaning of separatism.

HIS HONOUR:

*China's territorial claims are advanced in.*

MR STUMER: Yes, your Honour. And that paragraph continues over to the top of the next page. There is then a paragraph in between that I don't rely upon.

HIS HONOUR: No.

MR STUMER: Then in the paragraph under that which begins:

*It is in this context then that the significant status and authoritative power of the statement.*

I don't rely on what he says about the Global Times because that's not relevant.

HIS HONOUR: Can you say that again?

MR STUMER: I don't rely on what he says about the Global Times in that paragraph because that is not relevant.

HIS HONOUR: So:

*Both of which we would observe.*

So on and so forth? The words in parenthesis you don't rely on?

MR STUMER: No, I don't rely on any of that - sorry. I'm sorry, your Honour. I don't need to rely on those, your Honour - - -

HIS HONOUR: What you want to rely on is the sentence:

*It is in this context then the significant statement is an authoritative power of statements made by both the Chinese consul in Brisbane as well as the Global Times must be understood.*

MR STUMER: Yes, "must be understood".

HIS HONOUR: I understand.

MR STUMER: Your Honour can take out the words "as well as the Global Times" as well because we are not concerned with the interpretation of that statement.

HIS HONOUR: Okay.

MR STUMER: Those are the bits I am relying upon. The reason I am relying upon them - - -

HIS HONOUR: Do you rely on the rest of that paragraph:

*Indeed we must emphasise.*

MR STUMER: Yes, sorry, I do, your Honour. I did intend to rely on the rest of the paragraph.

HIS HONOUR: That is right, that would seem to be how that would work. Is that it?

MR STUMER: Yes, it is, your Honour. The other bits are too general.

HIS HONOUR: Yes and you know there is another problem though. I note you don't rely on them but, first of all, putting aside whether there actually is a field of specialised knowledge and training that has some kind of consensus about the principles to be applied because otherwise it is not the kind of field of specialised knowledge and training that can guide a court - - -

MR STUMER: Yes.

HIS HONOUR: - - - of the meaning of the use of certain words in Chinese politics. Accepting there is such a field, respectfully to the Emeritus Professor it doesn't have the tenor of an impartial and an objective expert:

*But as we know here it is rhetoric that expresses deeply-held and fanatically promoted ideas that lie at the heart of.*

Various things.

MR STUMER: Yes.

HIS HONOUR:

*These cliched fulminations are also incendiary and…*

MR STUMER: Yes, I understand your Honour's concern about that.

HIS HONOUR:

*We note it is high time that individuals -*

and so on and so forth:

*Late imperial practice -*

he is probably on the money with what led to the invasion of the Ukraine though, not that he speaks about that but one might think those kinds of ideas are what lie behind that as well. In any event, I digress. It makes it - where the area of expertise is one that strikes me as odd, where the report doesn't on its face indicate in form or in substance an understanding or a compliance with the duties of an expert, where the

report is - uses, with respect to him, the kind of language that you don't normally see in a report that appears to the court to be impartial and cautious as you would expect of an expert coming under their duties.

MR STUMER: Yes, I can't put the submission any higher than I put it.

HIS HONOUR: Okay. Understood. I will think about it, Mr Stumer.

MR STUMER: Yes. Thank you, your Honour. Your Honour, just to complete the consequence of events there is then the publication in the Global Times that names Mr Pavlou. I don't, of course, say that the respondent consul-general was personally responsible for the publication in the Global Times. I do say however it was reasonably foreseeable that the statement would be published further in Chinese media. Your Honour might even infer that it was intended that it would be published further.

Then following on from the statement and the Global Times article there were the various threats made really immediately upon those publications and - - -

HIS HONOUR: That is, of course, as we have discussed Mr Stumer, a part of the difficulty in that the Global Times article made - even accepting at its highest for your client that which was implied, express - and the consul-general - even if you accept the way that I should interpret it and I am far from doing so still, he's not responsible or at least it is not possible for me to conclude he is in any way responsible for the more pointed and individual attack on the applicant which undoubtedly can be seen in the subsequent article.

MR STUMER: Yes.

HIS HONOUR: That might be thought to have been the effective cause of this.

MR STUMER: Yes, I understand what your Honour says about that. But nonetheless the statement of the consul-general, interpreted on its own terms, in my submission, is in effect a threat to procure others to assault people like Mr Pavlou who engage in pro-Hong Kong or pro-democracy activism.

HIS HONOUR: Is there a difference though between a threat to procure people that do it and giving comfort to those who do? Because, you see, on one view of it even adopting the interpretation of some of the lines of the consul-general's statement, nowhere does it say expressly or impliedly, "And I am going to get other people to do this to you, buddy." Even on the interpretation you urge on the court it's these people did this and "we've got your back" as you so eloquently put it.

MR STUMER: Yes.

HIS HONOUR: A bit of a nod and a wink and "we've got your back". Now why is that a threat to procure people to do it. Why isn't that just giving comfort to those who might choose to?

MR STUMER: The way I would put it is that it is like giving a green light to the people who might engage in that behaviour so that is a form of procurement. It is an implied statement of, "Go ahead, we've got your back." It is implied, it is not expressed, of course.

HIS HONOUR: Yes, yes, well perhaps you would put it like this, giving the green light to people who look to you for authorisation.

MR STUMER: Yes.

HIS HONOUR: Because that second part is important - - -

MR STUMER: Yes.

HIS HONOUR: - - - to turn it into something that could be characterised as such a threat.

MR STUMER: Yes, "You are not going to be in trouble with the Chinese authorities if you engage in that conduct and we will firmly safeguard your rights" in the language that is used.

HIS HONOUR: I understand how it plays out with the rest of it.

MR STUMER: Yes, yes.

HIS HONOUR: Possible, yes. Okay.

MR STUMER: Now, your Honour has raised the question of the fear that my client has.

HIS HONOUR: Yes.

MR STUMER: Can I address that firstly by taking your Honour to the body of the affidavit that I think we are in where the statement is. It is under tab 2 in the folder.

HIS HONOUR: Yes. Well, we will do this - I want to come back to the separatist thing, I want to say - I want to give you an opportunity to comment on something about the separatist point.

MR STUMER: Yes.

HIS HONOUR: But we will do this first.

MR STUMER: So your Honour had raised a concern about the link between the conduct of the consul-general and the fear.

HIS HONOUR: Yes.

MR STUMER: Your Honour, with respect, is correct that the later affidavits don't

explicitly draw that link.

HIS HONOUR: Yes.

MR STUMER: But the first affidavit does draw it in tolerably clear terms, in my submission. That is: fear is a fear of the consul-general. I would ask your Honour to look in that affidavit at paragraph 9.

HIS HONOUR: Yes.

MR STUMER: And then paragraph 15, this is all leading up to paragraph 17 where he is talking about the threats of the defendant and what happened and the market day assaults were reported to the police in paragraph 16. Then he says:

> *I fear for my safety and that of my parents.*

In this affidavit the fear, just on a natural reading of the affidavit, is linked to the threats of the defendant on 25 July 2019 as they are described in paragraph 15.

HIS HONOUR: Well, maybe. If you look at paragraph 9 though:

> *I believe that the defendant's threatening statement has sufficiently*
> -

well, the "I believe" is irrelevant.

MR STUMER: Yes.

HIS HONOUR:

> *The defendant's threatening statement has sufficiently identified me and is directed at me for two reasons. One, his description of a small number of people with ulterior motives and I have been named by the Chinese Communist Party owned Global Times.*

So as I said, and I think you agree, at least in a court of law the consul-general is not responsible for what the Global Times might do.

MR STUMER: No.

HIS HONOUR: So the threat has to sufficiently identify Mr Pavlou to the extent that is an integer in the steps towards establishing fear of the consul-general in particular.

MR STUMER: I would read paragraph 9 a little bit differently to that, your Honour.

HIS HONOUR: Please do.

MR STUMER: The first phrase is:

*I believe the defendant's threatening statement has sufficiently identified me and is directed at me as I am included in his description of a small -*

etcetera. So just leaving it there he is saying the threatening statement has sufficiently identified me.

HIS HONOUR: Agreed.

MR STUMER: Then he goes on and makes what, in my submission, is a separate point, "And by the way I have been named by the Global Times."

HIS HONOUR: Agreed. I think it is fair to read it like that.

MR STUMER: So his understanding is that the threatening statement, as he calls it, identifies him because he is one of a small number of people and then that understanding then flows through into 15 so that it's - the Global Times is part of the course because they actually put his name out there but, in my submission - - -

HIS HONOUR: See, Mr Stumer "they" I kind of assume that they is the consul-general conspiring with others. It's geo-political - - -

MR STUMER: No, no - - -

MR STUMER: - - - real politics might think it should be seen that way but, no, I don't say you are saying that to me but if you don't look at it like that the publication is made and then the next day the Global Times names Mr Pavlou.

MR STUMER: Yes.

HIS HONOUR: Then after that a whole series of things happen. I have to be satisfied that there is - that the consul-general's statement materially contributed to, to use language from general causation analysis, the things that happened thereafter. Because if I don't then why does someone have fear of the consul-general? Why isn't the fear of the Global Times and what it says about Mr Pavlou?

MR STUMER: Yes. It might be subtly different to that. If the question is: is there a fear then it is Mr Pavlou's understanding that matters rather than the actual causation that your Honour might find. Your Honour might find that the Global Times article is an integral part of the causation. But if one is looking at the fear that Mr Pavlou has his understanding of what has happened is relevant.

HIS HONOUR: True except isn't there authority that the fear has to be reasonably based on the acts that are the subject of complaint. I can't give it to you, Mr Stumer, I just thought I had read that in the course of looking at lots of cases yesterday.

MR STUMER: I think it is Laidlaw v Hewitt is the authority.

HIS HONOUR: That seems to be the only thing in the Court of Appeal about this actually.

MR STUMER: Yes and I looked at - there is lots of other authorities referred to in Laidlaw v Hewitt because Justice McPherson, with respect - - -

HIS HONOUR: Did the full job on it.

MR STUMER: - - - has done a very thorough job of investigating the history. Unfortunately none of the other cases that he referred to help us on any of the points that your Honour has to determine.

HIS HONOUR: No, I know. Because that case was more about trying to understand how the Peace and Good Behaviour Act, like what is it and what is it doing here? So the author of The History of the Supreme Court of Queensland did the job on that point. It is full of incidental titbits of assistance but, as you say, it is not really about that. But I thought they did say that. That the fear has to be reasonably based on the act that's the subject of the complaint. But if it is not there, Mr Stumer, I accept that.

MR STUMER: No, I'm pretty sure it is there, your Honour. It might even be in President Fitzgerald's judgment. It is there somewhere. I think - - -

HIS HONOUR: You are not cavilling with the legal proposition?

MR STUMER: No. So I mean, I have to tread a careful line, your Honour, because as your Honour, with respect, has rightly identified I can only rely upon conduct that can be linked to the consul-general and the Global Times report cannot be.

HIS HONOUR: Yes, see - sorry, I think that's why it is a difficult case. I mean, you can step back and look at all this apprised of, one might think the way the world has worked over the last few years, although there seems to have been a change in the strategy and understanding things might be happening in a certain way but that's not the way the common law works as you know.

MR STUMER: No and, your Honour, my client has obviously particular views about what's - what happened to him and what is continuing to happen to him.

HIS HONOUR: That is fair enough. Based on his material it is very very unpleasant.

MR STUMER: Yes but your Honour - - -

HIS HONOUR: I don't have a problem with that.

MR STUMER: - - - of course can only act on - - -

HIS HONOUR: The evidence.

MR STUMER: - - - the things that are admissible and only - - -

HIS HONOUR: Which tend - because part of the problem Mr Stumer, really, and I am not saying that - I haven't decided yet. But as has been observed I think in a case of the Chief Justice's when she was in this court, I read about five of them last night but she said "Look, you know, this is not really what this Act is for." I think it was the one before her Honour, it might have been one before the Chief Judge now but anyway it said, "Look, you are trying to use this Act to do something that it wasn't really intended to do."

MR STUMER: Yes.

HIS HONOUR: And that's, I think, part of the difficulty here the applicant has, an understandable hypothesis about the operation of the sending state but to try to fit it within the individualistically focussed provisions of this Act is what makes it difficult.

MR STUMER: Yes.

HIS HONOUR: But that's not to say - of course, Mr Stumer, if it does - it does based on the evidence we've got but I think that's why it is difficult.

MR STUMER: Yes, it is not an easy case, your Honour.

HIS HONOUR: I am not worried about that at all.

MR STUMER: I don't say it is an easy case. I think the case that your Honour might have in mind is Evans v NBN Co.

HIS HONOUR: Judge Long's decision.

MR STUMER: Yes, about trying to suppress the use of the 5G network using peace and good behaviour orders.

HIS HONOUR: Yes, it is at the end where his Honour after a very very extended analysis comes up with the conclusion that assault means assault in the Code.

MR STUMER: Yes.

HIS HONOUR: Then says a few other things about the resolution of that particular case.

MR STUMER: Yes.

HIS HONOUR: Thanks, Mr Stumer.

MR STUMER: So, your Honour, if - - -

HIS HONOUR: Anyway, that's the evidence you've got.

MR STUMER: That's the evidence we've got and then what I ask - what I - - -

HIS HONOUR: It is not an unarguable proposition.

MR STUMER: Yes, what I say about the later evidence about the fear is that it is all started by the statement and so what, in effect, has happened is that the consul-general has opened the door to personal attacks and intimidation of my client. That's why there is that continuing fear of the consul-general.

HIS HONOUR: I understand the submission. Yes. So that is ultimately then your submission as to why those parts of Mr Pavlou's affidavit that you seek leave to rely on, on this appeal, are at least colourably admissible. Admissible, forget about the adverb.

MR STUMER: Yes, your Honour. Yes.

HIS HONOUR: All right. Well, look - - -

MR STUMER: Because when read in the context of the first affidavit they show the continuing fear connected to the consul-general. Albeit that I accept your Honour's point that the later affidavits don't say it in terms.

HIS HONOUR: It is not so self-evidently utterly irrelevant that I would refuse leave to rely on it. So I will give you leave to rely. Well, it is in.

MR STUMER: Thank you, your Honour.

HIS HONOUR: It is in. So I will give you leave to rely on the appeal to the extent you need it on the affidavit of 4 October 2022 and the other paragraphs - paragraphs 1 to 11 of the affidavit sworn 1 May 2022.

MR STUMER: Yes.

HIS HONOUR: So it's all admitted.

MR STUMER: Thank you, your Honour. On that note, your Honour, we move to the legal issues.

HIS HONOUR: Yes.

MR STUMER: I will have to take your Honour to some of the case law.

HIS HONOUR: That is all right. It is all right, Mr Stumer, I am not unhappy.

MR STUMER: I had partly hoped to be finished by 1, your Honour, but I think now perhaps I won't be.

HIS HONOUR: That is partly my fault, Mr Stumer. But I am trying to get as much

help out of you as I can while you are here.

MR STUMER: Yes and certainly the way that I approached this phase of the submissions is that I want to be able to assist your Honour.

HIS HONOUR: I understand.

MR STUMER: Because these are questions that haven't been grappled with by Australian courts or English courts. I have not been able to find really anything on point in either jurisdiction.

HIS HONOUR: No.

MR STUMER: As your Honour will have seen in the submissions there are some United States cases and cases from other jurisdictions. So there is some uncontroversial propositions to begin with.

HIS HONOUR: Yes.

MR STUMER: The first is that certain provisions of the Vienna Convention on Consular Relations have been incorporated into Australia law by the Consular Privileges and Immunities Act. Article 43(1) is one of those.

HIS HONOUR: Yes.

MR STUMER: It provides that:

> *Consular officers shall not be amenable to the jurisdiction of the judicial authorities of the receiving state in respect of acts performed in the exercise of consular functions.*

HIS HONOUR: Yes.

MR STUMER: Also uncontroversial: The question of consular immunity is jurisdictional.

HIS HONOUR: Correct.

MR STUMER: If it applies, the Magistrates Court had no jurisdiction and this court has no jurisdiction.

HIS HONOUR: Understand, yes. That has lots of implications, in particular, that you don't have to show up and claim the immunity - - -

MR STUMER: Yes.

HIS HONOUR: - - - once it goes to jurisdiction.

MR STUMER: Yes.

HIS HONOUR: The court has to decide that it has.

MR STUMER: That is right.

HIS HONOUR: I understand.

MR STUMER: That is the point that is made in Zang v Zameer which is another - - -

HIS HONOUR: I understand.

MR STUMER: - - - uncontroversial point. Your Honour has that case. In fact your Honour took me to it on the last occasion. There are then three further general propositions that, in my submission will assist your Honour in determining whether the immunity applies. The first is that consular immunity is described as a functional immunity. The immunity applies not to the person of the consul but rather only to acts performed in the exercise of consular functions. In this respect consular immunity must be distinguished from diplomatic immunity which applies to the person of the diplomat.

HIS HONOUR: This is the analysis advanced in Lee v Quigley?

MR STUMER: That is right, your Honour.

HIS HONOUR: I did - I am happy for you to take me through it but I did read it this morning.

MR STUMER: Yes.

HIS HONOUR: Actually, what edition have you got there, Mr Stumer. Is it the third edition?

MR STUMER: I have the third edition.

HIS HONOUR: That is the current edition?

MR STUMER: It was the most recent one I found.

HIS HONOUR: Yes, me too.

MR STUMER: Your Honour has the relevant chapter in the folder I have given you as well.

HIS HONOUR: Yes.

MR STUMER: So that - those words “functional immunities” certainly come from Lee v Quigley’s text but they are also supported by the cases in that area. The distinction between diplomatic immunity and consular immunity is recognised in a

decision of the Victorian Court of Appeal from last year. This is Republic of Turkey v Mackie [2022] 64 VR 467.

HIS HONOUR: This is something I had not looked at before and I hadn't adverted to it.

MR STUMER: Yes, it is under tab 11. I will just - the case generally isn't quite on point but there are some parts in it - - -

HIS HONOUR: No, like all the others.

MR STUMER: That is right. But just to give your Honour the background, a builder had commenced proceedings in the Victorian Civil and Administrative Tribunal seeking payment of monies outstanding under the contract for the demolition of an existing residence and construction of a new consular residence for Turkey's consul-general. The issue was whether the action was one "affecting consuls" so that it would fall within the judicial power of the Commonwealth as set out in section 75(2) of the Constitution.

HIS HONOUR: Is there a provision in the Constitution talking about things that affect consuls?

MR STUMER: Yes. Yes, it is section 75(2). It tells us that it is within the original jurisdiction of the High Court. The issue in Mackie was that VCAT couldn't take on that federal judicial power so the issue was by having this action in VCAT are you taking on that thing that affects consuls and is therefore - - -

HIS HONOUR: So there is no - as a matter of constitutional limitations on power the State of Victoria couldn't confer jurisdiction on VCAT to decide a case affecting consuls?

MR STUMER: That's a fair summary of it, your Honour, yes.

HIS HONOUR: I bet consuls are going to find it hard to get people to do work for them in Victoria after this.

MR STUMER: Quite possibly. I think it could have been pursued in a different court in Victoria, a chapter 3 court.

HIS HONOUR: Well, there would be some kind of general delegation you would think somewhere under the Judiciary Act or something of original jurisdiction in this area to certain state courts, wouldn't there be?

MR STUMER: Yes, I don't think the point was that it was exclusive, it is just that it was federal jurisdiction and therefore couldn't be conferred on a non-chapter 3 court.

HIS HONOUR: Yes, by the Victorian Parliament. The federal Parliament had to confer it on a state court.

MR STUMER: Yes.

HIS HONOUR: Anyway, doesn't matter.

MR STUMER: Anyway, the part - - -

HIS HONOUR: So this is - sorry, go ahead. What's the - - -

MR STUMER: That is all just by way of explaining what the case was about. The part that is relevant to us and I am taking your Honour to it because it endorses in effect this distinction - - -

HIS HONOUR: Between a diplomat and a consul?

MR STUMER: Yes and the concept of functional immunity for consuls. So it is at page 479 which is within paragraph 41 and if your Honour looks about six lines down there is a sentence that begins:

*Under long-standing rules of international law.*

HIS HONOUR: Did you say page 4?

MR STUMER: Page 479.

HIS HONOUR: Yes. Okay. Yes, the reason for that - sorry, I had to look into this recently for another reason - and the reason for that really is a diplomat is the state, a consul-general is doing things on behalf of the state when they are being a consul. When they are not being a consul then they are not protected because they are not the state.

MR STUMER: Yes.

HIS HONOUR: A credited diplomat is the state.

MR STUMER: Yes.

HIS HONOUR: I understand.

MR STUMER: It goes a little bit of a step further than that, one has to find a consular function in the performance of which the act is carried out.

HIS HONOUR: Agreed. I see that Lee v Quiggly spent a lot of time before they get to the consular functions talking about whether something can be characterised as an official act or not an official act.

MR STUMER: Yes.

HIS HONOUR: Or a private act and I didn't - I was thinking well that's very interesting but we have an act of the federal Parliament that says you don't have

jurisdiction for acts which are consular functions and effectively an Act of the federal Parliament says this is what consular functions are.

MR STUMER: Yes.

HIS HONOUR: So I couldn't understand - and I was wondering when they were ever going to get to that and I don't quite even understand how the focus on consular functions part sits with the first part of their chapter.

MR STUMER: Yes. In my submission, it doesn't.

HIS HONOUR: No, it doesn't, does it?

MR STUMER: I will take to you some cases about this because the mere fact that the consul is acting as consul at the time of the acts doesn't mean that he's performing the acts in the exercise of the consular function.

HIS HONOUR: No, because the Parliament has defined what - - -

MR STUMER: Yes.

HIS HONOUR: - - - what an act - because this is like the approach you take to offences under the Code. The Code makes acts an offence. So what the Vienna - I have actually found doing some crime very helpful, actually, to thinking about these sorts of things. Here there is the jurisdiction is excluded for certain acts. So you identify the act and then what is it about that act which takes it outside of the jurisdiction of inter alia, this court. That is, that it is performed in - whatever the words are - performing a consular function.

MR STUMER: Yes.

HIS HONOUR: Then the Act says a consular function is these things.

MR STUMER: Yes.

HIS HONOUR: So I just don't understand the argument to the contrary. That means you probably don't have to say anything more about it.

MR STUMER: No, with respect, everything your Honour has said there is right in my submission because - we will see this in a moment when I take you to some cases but you've got situations where somebody acting as consul, even sitting in the consular office and saying something and the courts have said, "Well that is not a consular function." The case we will come to is Bigelow v Princess Zizianoff. The consular function was approving or disapproving of a Visa for Princess Zizianoff and then having performed that function consul Bigelow makes some statements in his consular office to journalists - - -

HIS HONOUR: Defaming her.

MR STUMER: - - - to the effect that she was a - she was spying for the Germans in Russia during World War I and now she was spying for the Russians in the United States. What the court says there is that those last bits are not consular acts. Sorry, they are not consular functions and so there is no immunity from those even though he's acting in his capacity as the consul. That's an important point, in my respectful submission.

HIS HONOUR: You can't press that too far though, can you. I mean - - -

MR STUMER: I never press anything too far.

HIS HONOUR: The generic you. Because what - once something is prima facie done in the course of acting as consul, you then have to sever incidental matters. They have to be sufficiently distinct to sever them from being part of, to use an inappropriate term but that might make sense to you, part of the res gestae, as it were.

MR STUMER: Yes.

HIS HONOUR: But the principle - that is just saying in applying this principle it has to truly not be something that is an act which can be characterised as one of the consular functions listed in the capital A act.

MR STUMER: Yes.

HIS HONOUR: In doing that, sometimes you are going to err on the side of well, it mightn't have been strictly issuing the passport but if it is, you know, going to the shop to the buy the ink to stamp the passport maybe that's different. If it is going to the shop to buy lunch while you are having a break that might not be. They are not good examples but that's just a factual inquiry really about where the boundary is.

MR STUMER: Yes, it gets a little bit - it gets complicated. Can I come back to the points I was going to make?

HIS HONOUR: You keep doing - sorry, I keep interrupting you. You just keep - - -

MR STUMER: All the points that your Honour is making are very much the points that I am - was going to make and I hope they will be useful, at least this discussion will be useful.

HIS HONOUR: Yes.

MR STUMER: So we were talking about the distinction between consul immunity and diplomatic immunity.

HIS HONOUR: Yes.

MR STUMER: And I have taken your Honour to the judgment of Justice Tate. The same point is made in a case called Arkaya v Payez. It is under tab 1. I won't take your Honour to this now because it is really just the same point.

HIS HONOUR: Yes.

MR STUMER: I might just read a passage to your Honour without your Honour going to it:

> *On a question of immunity a consul is not immune from suit except when the action is based upon acts which he has committed within the scope of his duties. An ambassador or Minister is, however, absolutely immune from suit even though it be based upon personal transactions.*

That's at page 466 to 467 of Arkaya v Payez.

HIS HONOUR: Can you just bear with me while I just mark that?

MR STUMER: Yes, tab 1.

HIS HONOUR: Yes, I've got it.

MR STUMER: Four hundred and sixty-six to 467.

HIS HONOUR: Yes, paragraph 2.

MR STUMER: Yes.

HIS HONOUR: Then he draws the distinction in the next part of that paragraph.

MR STUMER: Yes, that is right. The second proposition is that in my submission it is important to draw a distinction between a consular function and the act which is performed in the exercise of that consular function. That can be a difficult distinction to draw especially where the alleged consular function is a bit ill-defined because the act can blur into the function. The act that is being done is both the act and the function. It is very easy to get into that way of thinking about things.

HIS HONOUR: Isn't it, though, that a person does an act and then it has to be characterised. Is it an act that can be characterised as one of the consular functions or can't it be?

MR STUMER: Yes - well, no, it is the function that has to be characterised and then one asks whether the act is performed in the exercise of that function and one of the problems throughout the cases is that that distinction is often not clearly drawn and the two are collapsed into each other.

HIS HONOUR: Just in case I am misunderstanding something, I think my proposition to you and yours to me was the same one because - just going about it a different way. So you can say this is the act, that act - for that act not to be exposed to the judicial authorities of this country, that act has to be an act which can be characterised as being the exercise of a consular function. So you've got to look to

the various heads of conduct.

MR STUMER: Yes.

HIS HONOUR: And see if the act can, in the circumstances - or does fall within the scope of one of those functions.

MR STUMER: Yes.

HIS HONOUR: I think what you said to me is well, you identify a function of the various functions and then say, "Can an act fall within one of those functions?"

MR STUMER: Yes.

HIS HONOUR: Which actually has been the way it has been approached in this case so far by people saying well, it is A, E or M, I think.

MR STUMER: Yes.

HIS HONOUR: But to say it the other way is the same thing because it involves - but I want you to disagree if you can because otherwise I am not quite understanding - - -

MR STUMER: I don't think I disagree. I don't think I disagree.

HIS HONOUR: Because when you are assessing criminal liability you focus on acts and then you say well, do those acts fall within the scope of any offence creating provision. I think that is probably the right analysis. I think where it goes wrong is that people don't focus on what the act actually is that you're claiming immunity in respect of.

MR STUMER: Yes.

HIS HONOUR: It is just nice - nice is a silly word - it is convenient here because at least there is in your case a quite distinct act.

MR STUMER: Yes.

HIS HONOUR: It is publishing this communication on this day.

MR STUMER: Yes.

HIS HONOUR: Understood, I agree that is how it should be done.

MR STUMER: I suppose the thrust of my point is that one has to find a consular function which one can fit the act within.

HIS HONOUR: Agreed.

MR STUMER: Yes.

HIS HONOUR: Which is why I didn't understand this official and non-official thing. I was reading it going - but that's not how it works in Australian law because - - -

MR STUMER: Yes.

HIS HONOUR: Just before we leave that just tell me if you disagree with this. If you look at 43(1) it gives immunity in respect of acts. Look at an act and then you have immunity if it is an act and is performed in the exercise of consular functions. Then you go to section 5 and it says:

*Consular functions consisting -*

there isn't any room - it is not "includes" or "can include" or "extends to" which might be vaguer. It says consular functions are these things.

MR STUMER: Yes.

HIS HONOUR: Lots of countries spent a lot of time agreeing on what this should say.

MR STUMER: Yes.

HIS HONOUR: So I just don't understand that whole official, non-official thing.

MR STUMER: No, I - - -

HIS HONOUR: It seems to be a gloss on the statute.

MR STUMER: I think it is something that possibly arises from cases in jurisdictions that don't draw the distinctions as sharply as we do in the common law.

HIS HONOUR: Could be so. That is your second point, a distinction between consular functions and the act performed.

MR STUMER: Yes.

HIS HONOUR: To be able to fit the act performed - and here we know exactly what act you are complaining about - - -

MR STUMER: Yes.

HIS HONOUR: - - - into a consular function.

MR STUMER: Yes.

HIS HONOUR: If it doesn't, it is not subject of immunity.

MR STUMER: Yes, your Honour.

HIS HONOUR: Next one?

MR STUMER: I think your Honour's across the point that there are heads of consular function within article 5. I just observe briefly that many of those consular functions are things which you might describe as administrative. Things like issuing passports, acting as a notary - - -

HIS HONOUR: Frankly, the sorts of things that most honorary consuls only do.

MR STUMER: Yes, and what those sorts of functions are not a political-type function of setting out the position of the sending state on various topics.

HIS HONOUR: No.

MR STUMER: In my submission there is no head within article 5 of a consular function which involves making political statements in respect of a position of the sending state.

HIS HONOUR: Yes, but you see, by putting the words "political" in front of statements you are characterising the statement as political.

MR STUMER: Yes.

HIS HONOUR: I accept it has to come within one of the heads.

MR STUMER: Yes.

HIS HONOUR: But also I think, and this is something you might want to cavil with, we don't read those heads down. Perhaps this is somewhere where the official and the personal idea can come up or where the underlying policy of the treaty comes into it or something. But because I was trying to think about what kind of statutory construction principle gets applied to 43(1) because for a conferral of jurisdiction the High Court has said you read them as broadly as the words can properly allow. For an exclusion from jurisdiction I'm not quite sure - I don't think that approach would apply because what you would need to - so read it as narrowly as possible because this is a special kind of exclusion.

MR STUMER: Yes.

HIS HONOUR: And the point of the exclusion is to facilitate the relations between nations and so I don't think you would be reading down the scope of the listed consular functions, at least if that which occurs can be seen as acting on behalf of the sending state. Now that only - that is not a free-standing head of consular function I just made up there. I am with you on the proposition that it has got to be fit within section 6 I think.

MR STUMER: Article 5.

HIS HONOUR: Article 5. But I don't think you read them down. So I don't think, for example, it would be right to - and I am not suggesting you were making this submission necessarily - to say "Well if it is a political statement it is not a consular function."

MR STUMER: No.

HIS HONOUR: If it can be fairly characterised as protecting in the receiving state the interests of the sending state.

MR STUMER: Yes.

HIS HONOUR: And I think, for example, saying things that are designed to support the maintenance of the sovereignty of the State, of the sending State in this case, would fall within that.

MR STUMER: Yes. Respectfully that's right, your Honour. One then gets to the question of: is it within the limits permitted by international law?

HIS HONOUR: Well, we haven't got there yet.

MR STUMER: And potentially also is it interference with the internal affairs of the state?

HIS HONOUR: I understand that.

MR STUMER: I know there is an email from your Honour's Associate about article 55 and it not being one of the articles that is incorporated. I had noted that in my - in a footnote to my submissions.

HIS HONOUR: Right. Well that's why I didn't assume that you had overlooked it. I was wondering whether I was right and did it make any difference?

MR STUMER: Your Honour's right. Article 55 isn't in the list of articles.

HIS HONOUR: Well, 55(1) anyway. Perhaps (2) and (3) are in.

MR STUMER: Yes. Article 55(1) isn't in the list. The way I have approached it in that footnote is to say that the meaning of the treaty is partly a matter of international law and you can rely on article 55 when you are interpreting article 43 and article 5.

HIS HONOUR: I don't think you can though, can you? I thought that might be the response. Right? But what do you think about this proposition though: there are two different functional contexts where the treaty in broad terms has to be construed and they can produce different outcomes. The first one is where, as here, we are grappling with what is the proper construction of the Act of the Commonwealth Parliament. That should be construed by reference to that which is included. That

which is excluded, right, should either be completely ignored or should be actually used to say well that is definitely not what they wanted to happen in Australian domestic law because they could have included it and they deliberately left it out and it is a pretty significant omission. Especially where they have gone well, we will have 2 and 3, thanks but not 1.

MR STUMER: Not 1.

HIS HONOUR: So the - you are construing an act of the Australian Parliament which effectively is what the language incorporated from the convention is, it is just incorporated by reference into the statute. Right? So you construe that. And then there will be another context which is sovereign-to-sovereign dealings where both sovereigns, the Crown in the right of Commonwealth and here I don't know - well, whoever is the sovereign - the embodiment of the sovereignty in the sending State in this case or, you know, the King of Norway or whoever. When they are dealing with each other they both signed on to the whole treaty so it would have a different meaning in their dealings between each other in the scope of their prerogative.

So to my mind, Mr Stumer, 55(1) is out and it has no place in the construction of the Commonwealth Parliament's statute accept that I might infer from the omission of that that the Parliament has deliberately turned its mind to and decided that no such duty arises.

MR STUMER: Yes, I can see how your Honour might reason that way.

HIS HONOUR: That's the idea, anyway.

MR STUMER: Yes. The only point I would raise is that I don't think it is the case that Australia exempted itself from article 55(1) when it adopted it.

HIS HONOUR: No, I agree. Well, put it this way: There is no evidence at all that they did.

MR STUMER: Yes.

HIS HONOUR: I think Australia - the Crown in the right of the Commonwealth when it signed up as an executive act to this treaty, I am willing to assume they signed up to the lot.

MR STUMER: Yes.

HIS HONOUR: I agree.

MR STUMER: Yes.

HIS HONOUR: My argument though assumes that to be the case and says there is two different constructions. When the Crown and the right of Commonwealth is dealing with the Crown and the right of, you know, Norway, they deal with each other in terms of what they say and do and so on on the basis of the whole treaty.

MR STUMER: Yes.

HIS HONOUR: But when a court, sitting in Australia applies the treaty they apply something different which is the bits that were taken out and made part of Australian law. Now, you might be able to have regard to the bits that weren't taken out to see what the purpose of the treaty is and so on and so forth.

MR STUMER: Yes.

HIS HONOUR: That is probably right.

MR STUMER: Yes.

HIS HONOUR: But what I don't think you can do is let 55(1) deliberately excluded in any way influence the construction except in a way that would not be helpful for you. That's my proposition.

MR STUMER: Yes, I understand your Honour's proposition. My proposition in the footnote is a different one but I can't put it any higher than an assertion.

HIS HONOUR: Well different - disagree - different in a way that disagrees with that but that is my view at the moment.

MR STUMER: Yes, I understand, your Honour.

HIS HONOUR: Super. That was - we got on to that because we were talking about the heads of consular function.

MR STUMER: Yes.

HIS HONOUR: And I delayed you by talking about subtle points on the margins.

MR STUMER: I think the jumping off point was my talking about political statements.

HIS HONOUR: Correct.

MR STUMER: Your Honour correctly said that political is - I can't remember exactly what your Honour said - but political is doing some work there which is vague is one way of putting it.

HIS HONOUR: Anyway, I understand that. Next point?

MR STUMER: I should just say I don't say that no statements could ever be - - -

HIS HONOUR: You have already told me - - -

MR STUMER: - - - an act in the exercise of a consular function.

HIS HONOUR: - - - what you meant.

MR STUMER: I see we are getting close to one. I am about to move to my third proposition which will involve going to a couple of cases. I am in your Honour's hands but I can keep going to one and then stop or I can - - -

HIS HONOUR: Well, just let me see where we are in your structure. So there is just the remainder of your legal submissions?

MR STUMER: Yes.

HIS HONOUR: And then what you want to tell me about the point of making the order in the light of the evidence that you properly put before me.

MR STUMER: Yes.

HIS HONOUR: The extension of time I don't think you need to say too much more about.

MR STUMER: Yes and because I have already addressed some of the things about the utility of the order I can do that in fairly short - - -

HIS HONOUR: Do you think you would be another half hour, Mr Stumer? I suppose you are sitting there thinking, "It depends on whether you keep quiet or not."

MR STUMER: I wasn't thinking any such thing, your Honour. I could be done in half an hour, your Honour so if your Honour is minded to sit on I'm content to do that.

HIS HONOUR: Let's box on, Mr Stumer. I won't promise to keep quiet.

MR STUMER: Let me just check something with my solicitor.

HIS HONOUR: We can take a short break if someone needs a short break.

MR STUMER: No, I was just checking something about my solicitor's availability.

HIS HONOUR: Okay. Let's push on, Mr Stumer, if you are okay to do that.

MR STUMER: Yes.

HIS HONOUR: Your third legal point?

MR STUMER: Yes, the third proposition which I have already touched upon and your Honour has made the point is; just because something purports to be in the exercise of the duties of the consul it is not determinative of whether the act attracts consular immunity. If I can take your Honour to tab 1, back to that Arkaya v Payez

case. Then if we go to paragraph 470 - - -

HIS HONOUR: I find these American federal supplements not very user friendly. I don't know, I always find them a bit hard to work out what is going on. Anyway, page 470.

MR STUMER: I agree, your Honour. So this case I should add predates the convention. It is a 1956 case and the convention is 1966 but the general principles that it is setting out have some relevance still in my submission. At 470 in the second paragraph in the first column:

> *As I stated at the beginning of this opinion a consul is immune from only such suits as grounded upon transactions within the scope of his official authority.*

Reference is there to things like official authority might be the source of what's happening in Lee v Quiggly, your Honour.

HIS HONOUR: I was just thinking that, it might be pre-statutory concepts.

MR STUMER: Yes, that is right.

HIS HONOUR: They don't die easily, that sort of thing.

MR STUMER: If your Honour would just give me a moment, I can probably make this point more quickly. This one was a libel action and the plaintiff who was a Venezuelan citizen was bringing a complaint against the consul-general of Venezuela. The consul-general alleged consular immunity and the question was whether the statements fell within - I put it in terms of the convention, the consular functions. In fact, the court held that they didn't. Then if we come to paragraph 8 I just ask your Honour to read that passage and over the page. The point I really wanted to draw your attention to is in the quote:

> *After he's done an act professedly official.*

This is on page 472:

> *I see no reason why an individual may not try the question here whether the act was within the scope of his authority.*

The point is just because it professes or purports to be in official capacity that is not determinative of the question.

HIS HONOUR: It is not determinative but I think what it does do is create an onus on the - an evidential onus at least on the person who says it is not to prove it is not. Because here - in any event, the onus lies on the applicant all the way through here and that is why the Parliament has adopted the concept of jurisdiction to define this, because the applicant always bears the legal as well as evidential onus on jurisdiction. Here once it is an act which on its face prima facie was an act as consul

that prima facie falls within one of the consular functions. There is at least an evidential onus to explain why it is not. That is an issue here.

I will give you fair warning about this, something I thought about a lot this morning because here it is plainly an act done as consul. I accept that doesn't do the business, right? It is prima facie able to be characterised as falling in with A, possibly E, M I think is not on the table for the reasons I have discussed with you. So it just creates a particular burden in demonstrating that it is not. But that doesn't mean that you can't question it and that a court might end up deciding well, no, it is not.

MR STUMER: Yes. I don't think I need to add anything to that, with respect. I was going to take your Honour to the Bigelow and Princess Bigelow v Zizianoff case. It is under tab 2. I told your Honour about that one already, it is the one where there was the denial of the visa and then the subsequent acts.

HIS HONOUR: "I deny your Visa and you are also an awful spy."

MR STUMER: Yes, that is right. The denial of the visa is an act in the exercise of the consular function. But the other acts are not. The mere fact he was doing it - actually, if your Honour goes to tab 2 you can see this on the first page. It is about halfway down under Monsieur Fortin:

> *Consul Bigelow in order to explain the decision of his government had in the course of an interview in his office furnished representatives of the press.*

So he is in his - - -

HIS HONOUR: Actually, isn't that interesting? I pause just sitting here thinking it would be a bit more difficult if his job was to file some kind of statement of reasons either for the lady or for his ascending State. That would be an area where they would be saying well, there are things on the boundary so if you do have to give those reasons, not to the press though as he did here, and they were defamatory and they went a bit further than they really had to go, you would say well, the act of giving reasons was within the scope of his consular function because here is the protocol book that says what you have to do. So the fact he went a bit far is not enough to take it outside. I was thinking about that without seeing this actually. He, of course, decided to tell the newspapers all about it.

MR STUMER: Yes and so to take up your Honour's example if in the course of rejecting the visa he writes a report to be put on the file of the consulate that is then read by other people in the consulate that would seem to be an act in the exercise of the consular function.

HIS HONOUR: Even if what was said was gratuitous and defamatory you might struggle. That is the point I was making about the way you would approach this.

MR STUMER: Yes.

HIS HONOUR: You know, of the margins you are going to cut consul some slack if what they are doing is sufficiently closely involved in their consular function.

MR STUMER: Yes.

HIS HONOUR: That's all.

MR STUMER: Yes so there will be things that are incidental to a consular function.

HIS HONOUR: Which you are allowed to do wrongly but are still covered by the immunity.

MR STUMER: Yes.

HIS HONOUR: I agree.

MR STUMER: I think that term "incidental" is used in this French decision in Bigelow.

HIS HONOUR: Because, in fact, here he did it to explain the decision to the government about why he had done it and then where he went wrong was to tell the press about it as well.

MR STUMER: Yes. If your Honour's interested in this, you may not be, but - - -

HIS HONOUR: I will probably read it anyway.

MR STUMER: One thing to be alerted to is that most of the report is the reasons of the Attorney-General. Then the decision of the court starts on page 178. But it starts with the words:

> *In conformity with the above argument the court has rendered the following decree.*

So one sees this in the European Court of Justice.

HIS HONOUR: Yes, I know, they have the - - -

MR STUMER: The advocate general - - -.

HIS HONOUR: - - - the advocate general.

MR STUMER: - - - who writes the reasons.

HIS HONOUR: Writes the reasons.

MR STUMER: And then the court, in effect, adopts them normally but only writes a very short judgment. So to understand the reasoning you have to go to what the advocate general said. I don't purport to be an expert on French procedure during

the 1920s but that appears to be what's happening in this case when your Honour comes to read it.

HIS HONOUR: Continental jurisdictions generally aren't big fans of detailed reasons anyway or long reasons.

MR STUMER: No, one sees it in the European Court of Human Rights as well, you get very short reasons often on things that are very complicated.

HIS HONOUR: Yes, it is the same in the Norwegian Hoyesterett which is the Norwegian equivalent of our High Court. You see things - there was a judgment on the question of whether - because I have an interest in Norwegian courts and law and so on. There was a judgment on whether it was a breach of the European convention on human civil and political right or the human rights convention or whatever to have juries deciding cases without giving reasons. You would imagine how much our High Court would spiel about something like that. It was after you listed all the judges that agreed and the reasons, because they have like 21 judges sitting in a full High Court there, it was about four pages and it basically said this is what they say, it is wrongful stop. I didn't learn too much about the reasoning from that case.

MR STUMER: Whereas the Supreme Court in the UK would have written five separate judgments each 50 pages long.

HIS HONOUR: Correct, I think a happy medium is probably the answer.

MR STUMER: Yes.

HIS HONOUR: Anyway, I note that. Thank you.

MR STUMER: Your Honour, from this point on I was going to proceed by reference to my written submissions.

HIS HONOUR: Okay.

MR STUMER: This is where I addressed article 5A, 5E and 5M. I can probably do it quicker and more efficiently by reference to those submissions.

HIS HONOUR: Sure.

MR STUMER: So it is article 5A involves or includes within the definition of consular function:

> *Protecting in the receiving State the interests of the sending State of its nationals, both individuals and bodies corporate, within the limits permitted by international law.*

I then have gone through in some detail in the written outline the Gerretsen decisions. I probably won't take your Honour through all of those now. I have gone through them in some detail.

HIS HONOUR: The Gerretsen reasoning does seem to be dependant in part on 55(1) being part of the contract - the act.

MR STUMER: Yes, it has both parts, in my submission. It goes to the internal affairs, interference and internal affairs certainly. But there is also then a discussion being not within the confines permitted by international law.

HIS HONOUR: I saw that it - I haven't analysed the case yet but I saw that it still seemed to have a second limb to it.

MR STUMER: Yes, if your Honour is against me on article 55 so that you are not persuaded by the interference with internal affairs point, then Gerretsen still assists my side of the case on the limits permitted by international law.

HIS HONOUR: I understand.

MR STUMER: I will leave it at that, your Honour. They are relatively short judgments, the three judgments.

HIS HONOUR: That is all right. That is okay, Mr Stumer.

MR STUMER: I won't take your Honour through them just in the interests of time. I do want to take your Honour to an Australian judgment. It is Minister for Foreign Affairs and Trading v Magno [1992]37 FCR at 298, it is under tab 9 of your Honour's folder.

HIS HONOUR: The Federal Court actually, I have always thought, could actually teach the English superior courts about long judgments.

MR STUMER: I think there might be three separate judgments in this case, your Honour, including one dissenting one.

HIS HONOUR: Anyway, I have got it.

MR STUMER: Again, this case isn't directly on point but there is just some very general principles that I will take your Honour to which have some bearing on our case. In Magno there was a challenge to the validity of a federal regulation that permitted the Minister to prescribe objects from being erected within 100 metres of a diplomatic mission. The question is whether the making of the regulations was authorised by the Diplomatic Privileges and Immunities Act. That act incorporated the Vienna Convention on Diplomatic Relations and article 22 of that treaty required receiving states to take steps to protect the peace and dignity of diplomatic premises. The question was whether the regulations fell within that. It is in the context of diplomats rather than consuls.

HIS HONOUR: Yes.

MR STUMER: It is a slightly different point about the peace and dignity of the premises. But the things that I want to take your Honour to are first at page 326, in the judgment of Justice French as his Honour then was. About halfway down the page there is a sentence that begins:

> *But subject to protection against those classes of conduct the sending state takes the receiving state as it finds it.*

I just ask your Honour to read from there to the bottom of the page. Two points to take from the passage and I will start from the beginning of the passage. The first is that when we are applying the international convention in that case it was the convention on diplomats, in our case it is the convention on consular relations but it is relevant when applying that within Australia to have regard to the well-established tradition of free expression including public comment on that as a domestic and international politics. That is the first point.

The second point is that when applying the international convention one has regard to the international conventions that deal with freedoms of assembly and freedom of speech. In my submission the same idea must apply here under the Consular Relations Act - sorry, the convention as incorporated in the Act.

Then there is a similar page 346. This is in the judgment of Justice Einfeld who dissented and would have held that the regulations weren't authorised. I think I am right to say that. But it is the paragraph that begins:

> *Political protests in the vicinity of embassies.*

HIS HONOUR: Yes, well what you say that means is that I should construe the reference in 5A which refers to - just let me gets the words exactly right - within the limits permitted by international law as confining 5A by reference to interfering with public protest.

MR STUMER: Yes.

HIS HONOUR: That is probably one of the less difficult steps in your argument. Although I am not necessarily sold on that yet but the more difficult is going to be - because - and this is quite fundamental I think, the act that amounts to - that takes the conduct outside or the character of the act that takes it outside 5A is that it involved an implicit threat to procure people to assault Mr Pavlou if he kept criticising the sending state.

MR STUMER: Yes.

HIS HONOUR: That's the - if I find that that is made out the idea that that's not within the limits permitted by international law is probably an easier task.

MR STUMER: Yes.

HIS HONOUR: Okay. That's very helpful those passages.

MR STUMER: Your Honour, that then brings me to article 5E. This is addressed commencing at paragraph 86 of my written submissions. The point that I made there by reference to the commentaries on the draft articles that were put out by the International Law Commission is that there is a distinction between A and E and in my submission E is really about assistance to particular people, it is not about promulgating the position of the sending State even vis-a-vis its nationals.

HIS HONOUR: That sounds persuasive.

MR STUMER: Yes. Article 5M we already have dealt with. That then brings us to the peace and good behaviour order. I might just take - - -

HIS HONOUR: Can I just ask you something so I don't find this out when you've gone: 5M, I take it the submission from the sending State's embassy didn't actually, albeit in an inadmissible way, identify something specific in respect of M?

MR STUMER: I am very sure that it doesn't even assert there was an entrusting of the function. It, in effect, assumes that because he has done the act it must have been entrusted to him.

HIS HONOUR: All right.

MR STUMER: Which, in my submission, is the wrong way around.

HIS HONOUR: Well, it is the wrong way around. It is not a matter of submission - well, I know it is. Of course it is the wrong way around. Not only that, you know - no, fine, keep going.

MR STUMER: Yes. If I can take your Honour to paragraph 107 of the submissions. I have set out there the powers on appeal as they are set out in section 225 of the Justices Act. Section 225(1) tells you that you can confirm, set aside or vary the appeal. 225(2) tells you that you can send it back to the Magistrates Court. That is an option available to your Honour.

HIS HONOUR: I do a lot of these appeals, Mr Stumer.

MR STUMER: Yes. All right. I won't trouble your Honour too much with that.

HIS HONOUR: I know I can do it, the question is should I if you have persuaded me of everything else?

MR STUMER: Yes. In my submission that would be the most practical and efficient course if your Honour got to the point of that. Your Honour has reviewed all the material, there's little likelihood that the respondent is going to come back even if it were remitted to the Magistrates Court so in my submission - well, that is the course I urge upon your Honour.

HIS HONOUR: You might be right, Mr Stumer, but it has got to be seen to be done

as well as done.

MR STUMER: Yes. Yes. Your Honour, I think we have already - we have really addressed the conditions in section 7(3) and the threat which is contained in the statement, the fear which is deposed to.

HIS HONOUR: I understand what the evidence is and what the submission is.

MR STUMER: So I won't trouble your Honour with that any more. One thing I think your Honour has raised this in the course of the day, is that the threat was made in, I will call it a threat, your Honour, I accept - - -

HIS HONOUR: That is all right, Mr Stumer. You are making submissions. Don't worry about that.

MR STUMER: It is made in July 2019 and - - -

HIS HONOUR: I will assume the word "alleged" appears in front of that each time you use the word "threat".

MR STUMER: Yes, your Honour. Then there is no evidence that the respondent has committed similar acts since then which is - it is a difficulty for the making of the order. It doesn't go to the jurisdiction point but it is a difficulty with making the order. In this context it is relevant in my submission that section 5(1)(b) of the Peace and Good Behaviour Act - - -

HIS HONOUR: Five?

MR STUMER: Five (1)(b) so it is a threat to procure any other person to assault or do any bodily injury, etcetera. The point I wanted to make here is that it's contained within that section that there's a person who is being procured to commit the acts and if your Honour was satisfied that the consul-general's statement does that procuring, part of the utility in making the peace and good behaviour order is that it communicates to the people who have been procured.

HIS HONOUR: There might be a problem with that as a matter of fundamental principle though. You see, what you would be asking me to do, I suggest, is make an order under 7(3)(b) exercising the powers that could have been exercised by her Honour below; that Mr Jie shall keep the peace and be of good behaviour for a year in circumstances where even the applicant doesn't say that there is a proper basis to assume that he is going to do anything else in the next year. And as we often find in considering bail and domestic violence orders and so on, the best evidence of what someone is going to do in the future is what they have been doing in the past. Especially when you look at these things two or three years after the incident.

MR STUMER: Yes.

HIS HONOUR: So courts don't make symbolic orders. If I don't - I say this propositionally. If I can't conclude that there is reason to believe that the person

complained about will do some act in the future like the one they've done in the past which I can prohibit by the statutory injunction then I don't make the order. I think it might be an error in the exercise of the discretion to make the order in circumstances where I've got no basis to think Mr Jie, even if he did commit this alleged threat, is going to do anything else to achieve some consequence in respect of the third parties. What do you think about that?

MR STUMER: Yes - - -

HIS HONOUR: Sorry, actually, there is more that could go into backing that proposition up but I put it to you propositionally at the moment.

MR STUMER: The difficulty with it is if you have one party who is procuring another party they only need to do the procuring once, as it were, in order for it to be a problem. I accept your Honour's point that you don't make orders that have no utility because there is no risk at all of an act occurring again. But in my submission, we don't quite get to the point where there is no risk at all of it occurring again because it has already happened in the past.

HIS HONOUR: He was here for two years after this happened. It was pretty clear that the sending State put little or no weight - let's call it no weight on the fact a complaint had been made. I don't think the fact there was proceedings on foot, which is sometimes a consideration in other areas, is a factor. It just didn't happen.

MR STUMER: Yes, although the embassy did say "We fully support the statement that has been made".

HIS HONOUR: And you know, again, you can't construe things by saying it is a dog whistle. Not that I am suggesting that you are but it says, "We support it and if there has been any misunderstanding there shouldn't be about that", or whatever the phrase was.

MR STUMER: It is a very short statement.

HIS HONOUR: It is, it is two lines and it is - because I did look at this because my interest was piqued by that suggestion. I've got it:

> *We believe the remarks are appropriate and measured.*

That's their opinion. Right:

> *Any misinterpretation of an overreaction to them are regrettable and unacceptable.*

Now, you can construe that as damning with faint disassociation. That is one way you could construe it. The other way you could construe it is in polite diplomatic language playing a straight back to what's happened. I don't think it can be characterised the way it is characterised in a statement, that I know you wouldn't say is admissible anyway, by the applicant in his affidavit. It is pretty neutral.

MR STUMER: Yes, if one starts - - -

HIS HONOUR: You might say what else would any embassy say no matter what they thought of what had been done?

MR STUMER: Yes. No, I understand, your Honour. If one starts with the proposition and I understand that your Honour can't start with this proposition - - -

HIS HONOUR: No, that's all right.

MR STUMER: - - - but if one starts with the proposition that the consul-general's statement contains the threats then the embassy statement is, in effect, endorsing them by saying that they are appropriate.

HIS HONOUR: Anyway, here's another idea on that point though, Mr Stumer. What you are really asking is for this court to tell the consul-general to reverse his threat:

> *Upon a consideration of the evidence the court may make an order that the defendant shall keep the peace and be of good behaviour and the order made by the court may contain such other stipulations or conditions as the court thinks fit.*

MR STUMER: Yes. Yes.

HIS HONOUR: The problem is that four is incidental to the powers conferred by 3.

MR STUMER: Yes, and - - -

HIS HONOUR: If I can't do 3B on the evidence as it is I don't think I can use 4.

MR STUMER: Also, if it is correct that the respondent is outside of Australia your Honour probably can't make any order under the Act. Well, it wouldn't be binding on him outside of Australia and probably on the interpretation of the Act your Honour couldn't make the order requiring him to do something outside of Australia. Slightly different if your Honour - the wording of the order that I proposed in the submissions - - -

HIS HONOUR: It would be futile squared.

MR STUMER: Yes. There is a statutory presumption against extraterritoriality.

HIS HONOUR: Well, true. See, the difficulty is, and I don't in any way criticise him for this, he's never appeared. He's never appeared and he is not here.

MR STUMER: Yes.

HIS HONOUR: So any order I make - well these are very interesting theoretical

questions but the fact that he hasn't done anything and he hasn't for two years and he is not here and hasn't been here for nine months or something are powerful discretionary reasons against making such order anyway.

MR STUMER: Yes.

HIS HONOUR: Yes, you understand what I am saying?

MR STUMER: That is why I raised the issue. They are powerful discretionary considerations. They are not necessarily determinative and conclusive.

HIS HONOUR: I think the difficulty is, though, that your answer to why there is utility in doing it is really a submission that what needs to be done is that the consul-general brackets erstwhile close brackets needs to be told to do something to call off those who have been procured.

MR STUMER: Yes.

HIS HONOUR: Because that's what you are complaining about. Not him but people who might have been inspired in the event that happened and we don't - I haven't decided anything about that, in the event that happened to dissuade them.

MR STUMER: Yes, I suppose the way I would put the utility in that respect is that an order that the respondent not engage in the conduct has the effect of saying he oughtn't to have engaged in the conduct in the first place.

HIS HONOUR: That, I think, is a political statement. Well, "political" is the wrong word but that is a symbolic imprecation to others and I just don't think that is what this Act will permit. Even if I did do it you might find that others elsewhere consider that an improper exercise of discretion.

MR STUMER: Yes.

HIS HONOUR: Which I suppose is a roundabout way of saying that I think it is an improper exercise of a discretion.

MR STUMER: I have made my submissions about it, I can't put it - - -

HIS HONOUR: You are right, Mr Stumer. I understand the point. I am sorry I am dragging it out with you but while you are here I want to try and, sort of, run some of these ideas past you and see what you have to say.

MR STUMER: The point I was trying to make is that the concept of procuring involves the other person.

HIS HONOUR: Yes. Yes, I get that.

MR STUMER: So that - - -

HIS HONOUR: If I found this threat had been made as alleged and if I found there was a basis to think you could have continuing effects then I can understand why the remedy would be in an ideal world to tell people not to do that. And to somehow neutralise the effect of the conduct.

MR STUMER: Yes.

HIS HONOUR: I understand that. I am just not sure it is a proper exercise of discretion where the power that I - the primary power I've got is to order someone not to do something again when that person hasn't done it for a long time and there is no prospect they are going to.

MR STUMER: Yes.

HIS HONOUR: That kind of power can be used to achieve that other objective.

MR STUMER: Yes, if we put ourselves back in the position shortly after this statement was made when there hadn't been a long period of no repetition of the conduct - - -

HIS HONOUR: Might have been different.

MR STUMER: - - - at that point it might be different. The difficulty that my client has is that he lost below on the immunity point and then hasn't appealed until now. I think it is correct that your Honour doesn't exercise the discretion as though you are in 2020, you would have to exercise it as of now.

HIS HONOUR: Correct and on the other side the applicant has had the benefit of seeing that whatever else others he might believe are doing to him, whether related to the sending State or not, he has the comfort that nothing further has come from the respondent. Certainly in domestic violence cases that is usually considered a good thing.

MR STUMER: Yes.

HIS HONOUR: But really, I am being a bit flippant, I shouldn't be. Mr Stumer, the point you make in substance is correct. I decide this now and that's the effect of the passage of time.

MR STUMER: It may be. It would be open to your Honour to think that there might be some risk of repetition of the conduct and that that risk, albeit small, justifies the making of the order.

HIS HONOUR: Understand.

MR STUMER: Yes. Your Honour, phase five of the submissions was about extension of time. That has already been addressed fully and I don't need to say anything more about that. Those are my submissions, your Honour.

HIS HONOUR: I will reserve it. Mr Stumer, I want to thank you and your instructing solicitor for the very considerable help you've given me in this matter. Particularly bearing in mind that the Commonwealth chose not to intervene to assist. I wonder actually on that point whether I should make Ms King's letter which I caused the Registrar to send to, I think, to Mr Tarrant an exhibit in the appeal?

MR STUMER: Yes, your Honour, in my submission.

HIS HONOUR: And just to record that. I will make this exhibit 2 in the appeal.

**EXHIBIT #2 ADMITTED AND MARKED**

HIS HONOUR: And just to record what is recorded in writing in any event which is that after my directions, which were made in open court, for the material to be served we received that letter from the AGS on behalf of the Commonwealth. I forwarded that to Mr Tarrant and perhaps you, I am not sure what my Associate did. But in any event the answer came back "We would like to proceed today." I forwarded your position, I didn't say anything about it, I forwarded your position or the applicant's position to the Commonwealth and the Commonwealth responded indicating they hadn't yet made up their mind but since they weren't a party they didn't want to be heard on whether we proceeded today or not. At which point I caused the Registrar to inform the AGS solicitor representing the Commonwealth that we were going ahead.

MR STUMER: Yes.

HIS HONOUR: And I haven't heard any more.

Can I say one thing about that, though? I don't have any opinion either way, that was a matter for them but in their absence for the diligent work that you have both done, I infer on a pro bono basis, I am very grateful. I will reserve the matter I think. I will reserve the matter and we will adjourn the court.

**ADJOURNED** **[1.40 pm]**